# Petition

81-941

No.

IN THE

Office - Supreme Court, U.S.
FILED
NOV 14 1981
ALEXANDER L. STEVAS
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1981

D. W. BROWNING CONTRACTING CO.,
TOM CLEMENTS, INC.,
E. C. GOLDMAN, INC., LAPIN SHEET METAL,
R & R INDUSTRIES, INC. AND VON-AIRE, INC.,
*Petitioners,*

*v.*

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GERARD C. SMETANA
500 Marquette Building
140 S. Dearborn Street
Chicago, Illinois 60603
(312) 346-4515
*Counsel for Petitioners*

Of Counsel:
KOVAR & SMETANA
500 Marquette Building
140 S. Dearborn Street
Chicago, Illinois 60603

Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D. C. 20006
(202) 659-9750

Pandick Press Midwest, Inc. • 454-7600

## QUESTIONS PRESENTED

1. May a collection suit under the Employee Retirement Income Security Act of 1974 be maintained if the requirements of Section 302 of the Labor Management Relations Act have not been met?

2. Must a federal district court or U. S. Court of Appeals decide the merits of a defense of illegality to an ERISA collection suit where the requirements of Section 302(c)(5) of the Labor Act have not been met.

3. Whether a party to a contract provision which he is attempting to have adjudicated under the National Labor Relations Act may raise a defense of illegality of that provision in an action brought by the Trust Funds seeking collection under ERISA.

4. Whether the Employee Retirement Income Security Act of 1974 authorizes a federal court to award attorneys' fees to a plaintiff in an action seeking collection of trust funds where legality under Section 302(c)(5) is raised as a defense and the nature of the suit is more akin to a third party beneficiary contract action under Section 301 of the Labor Management Relations Act which does not authorize an award of attorneys' fees.

---

D. W. Browning Contracting Co., Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc. and Von-Aire, Inc., Petitioners herein, are each corporations having no parent corporation or affiliates and no partially owned subsidiaries.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| INDEX OF APPENDICES | |
| OPINIONS BELOW | 2 |
| JURISDICTION | 3 |
| STATUTES INVOLVED | 4 |
| STATEMENT OF THE CASE | 5 |
| Background and Related Pending Litigation | 5 |
| The District Court's Decision | 11 |
| Court of Appeals Decision | 15 |
| REASONS FOR GRANTING THE WRIT | 24 |
| I. THE ISSUES PRESENTED IN THIS CASE ARE SIMILAR TO THE ISSUES PRESENTED IN KAISER STEEL CORPORATION V. JULIUS MULLINS, No. 80-1345, IN WHICH CERTIORARI WAS GRANTED ON MAY 4, 1981 | 24 |

II. THE COURT OF APPEALS' DECISION REFUSING TO CONSIDER VIOLATIONS OF THE LABOR ACT AS A DEFENSE OF ILLEGALITY SHOULD ALSO BE ACCEPTED BECAUSE NOT TO DO SO WOULD BE INCONSISTENT WITH THE DECISIONS OF THIS COURT 33

III. THE AWARD OF ATTORNEYS' FEES QUESTION SHOULD BE REVIEWED BY THIS COURT BECAUSE IT NOT ONLY RAISES IMPORTANT QUESTIONS ON WHETHER ERISA ACTIONS THAT DO NOT ALLEGE VIOLATIONS OF ERISA ARE MORE AKIN TO THE ATTORNEYS' FEES RULES UNDER SECTION 301 OF THE LABOR ACT BUT ALSO BECAUSE THE POLICY QUESTIONS ON ATTORNEYS' FEES HERE ARE INEXTRICABLY INTERTWINED WITH THE ATTORNEYS' FEES QUESTION ACCEPTED BY THE COURT IN KAISER V. MULINS, NO. 80-1345 35

CONCLUSION 39

TABLE OF AUTHORITIES

CASES: Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) ..... 35

Blassie v. Kroger, 345 F.2d 58 ..... 8

Bricklayers, Masons and Plasterers International Union, Local 15 v. Stuart Plastering, 512 F.2d 1017 (5th Cir. 1975) ..... 21

Central Florida Sheet Metal Contractors Association, 234 NLRB 1238 (5th Cir. Appeal pending, No. 79-2396 ..... 11, 18 ,25

Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975) ..... 33

I AM Local 1896 v. Brake and Electric Sales Corp., 279 F.2d 590 (1st Cir. 1960) ... 34

Kaiser Steel Corporation v. Julius Mullins, et al, cert. granted, 49 U.S. Law Week 3824 (May 4, 1981) (No. 80-1345).. 24, 26, 27, 35

TABLE OF AUTHORITIES


CASES: Page

Kelly v. Kosuga,
358 U.S. 516 (1959) ..... 28

Lewis v. Lowry, 295 F.2d
197, 199 (4th Cir. 1961),
cert. denied, 368 U.S.
977 (1962) ..... 37

McMillen v. Hoffman,
174 U.S. 639 (1899) ..... 28

Mobile Mechanical Contractors
Assoc. Inc. v. Carlough, et al
456 F.Supp. 310 on remand 7, 8
566 F.2d 1219 .....9, 17, 23

Mullins v. Kaiser Steel Corp.,
No. 79-1463 (D.C. Cir.
Sept. 17, 1980, petition for
cert. granted, 49 U.S.L.W.
3824, (May 4, 1981)
(No. 80-1345) .....23, 28

Murphy v. Inexco Oil Co.,
611 F.2d 570, 574
(5th Cir. 1980) ..... 36

Perma-Line Corp. v. Sign
Pictorial and Display,
Local 230, 639 F.2d 890
(2nd Cir. 1981) ..... 34

TABLE OF AUTHORITIES


| CASES: | Page |
|---|---|
| Taggert v. Efros, 475 F. Supp. 124, 125 (S.D. Tex. 1979) ..... | 36 |
| Thomas v. Reading Anthracite Co., 264 F. Supp. 339 (N.D. Pa. 1366) ..... | 31 |
| United Optical Union, Local 408 v. Sterling Optical Co., 500 F.2d 220 (2nd Cir. 1974) ..... | 34 |
| William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12 (1974) ..... | 33 |

CONSTITUTIONAL PROVISIONS AND STATUTES


Page

Employee Retirement Income Security Act of 1974, as amended:

29 U.S.C. § 1132(a)..... 4
29 U.S.C. § 1132(g).....4, 15

Labor Management Relations Act:

29 U.S.C. § 158 ..... 21
186(a)..... 4
186(b)..... 4
186(c)(5)..... passim
186(d).....4, 20, 22
186(c)...12, 13, 16, 19, 20

INDEX OF APPENDICES


| Appendix | | Page |
|---|---|---|
| A | Opinion of the United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., Nos. 78-1761 & 78-2071 (May 4, 1981) . . . . . | A-1 |
| B | Opinion (May 31, 1978) of the United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., C.A. No. 76-1957 . . . . . | A-23 |
| C | Order of the United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., C.A. No. 79-1957 (May 31, 1978) . . . . . | A-34 |
| D | Notice of Appeal filed by Defendants in the United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Anning-Johnson Company, et al., C.A. No. 79-1957 (June 28, 1978) . . . . . | A-35 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| E | Motion for Attorneys' Fees filed by plaintiffs in the United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et. al., C.A. No. 76-1957 | A-36 |
| F | Order of United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Anning-Johnson Company, et al., C.A. No. 76-1957, Granting Plaintiffs' Attorneys' Fees and Expenses (August 17, 1978) . . . . . | A-38 |
| G | Order of United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Anning-Johnson Company, et. al., C. A. No. 76-1957 Denying Defendants' Motion for Reconsideration (August 25, 1978) . . . . . | A-40 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| H | Notice of Appeal from Order entered on August 25, 1978 filed in the United States District Court or the District Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et. al., C.A. No. 76-1957 (September 25, 1978) . . . . . | A-41 |
| I | Petition for Rehearing and Suggestion for Rehearing en banc filed by Anning-Johnson Company, et al. in the United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et al., Nos. 78-1761 & 78-2071 (April 12, 1979) . . . . . | A-42 |
| J | Motion for Attorneys' fees filed by appellees in the United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Commercial Roofing & Sheet Metal, et al., Nos. 78-1761 and 78-2071 (May 22, 1981) | A-55 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| K | Order of United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Commercial Roofing & Sheet Metal, et al., No. 76-1957 (June 17, 1981) Denying Appellants Petition for Rehearing. | A-57 |
| L | Order of United States Court of Appeals for the District of Columbia Circuit denying Appellants' suggestion for rehearing en banc in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., v. Anning-Johnson Company, et al., No. 76-1957 and Consolidated Case No. 78-2971 (June 17, 1981) . . . . . | A-60 |
| M | Memorandum in Support of Motion for Attorneys' fees for appeal filed by appellees in the United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Commercial Roofing & Sheet Metal, et al., Nos. 78-1761 and 78-2071 (May 22, 1981). . | A-61 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| N | Memorandum in Opposition to Motion for Attorneys' Fees filed in United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et al., Nos. 78-1761 and 78-2071 (June 8, 1981) | A-74 |
| O | Order of United States Court of Appeals for the District of Columbia Circuit awarding Appellees attorneys' fees in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., v. Commercial Roofing & Sheet Metal, et al., Nos. 78-1761 and No. 76-1957 (July 17, 1981) | A-90 |
| P | Order of United States District Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. Commercial Roofing & Sheet Metal, et al., Nos. 78-1761 and 78-2071 (July 29, 1981) amending caption. | A-92 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| Q | Out of Time Motion to Stay Mandate Pending Application for Certiorari and Motion to Recall Mandate from District Court filed in the United States Court of Appeals for the District of Columbia Circuit in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et al., Nos. 78-1761 and 78-2071 (August 26, 1981) | A-94 |
| R | Order of the United States District Court of Appeals for the District of Columbia Circuit denying appellants' aforesaid motion for recall and stay of mandate in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al. v. D. W. Browning Contracting Company, et al. Nos. 78-1761 and 76-1957 (Sept. 14, 1981) | A-100 |
| S | Supreme Court of the United States Order Extending Time to File Petition for Writ of Certiorari in D. W. Browing Contracitng Company, et al. v. National Stabilization Agreement of the Sheet Metal Industry, et al., No. A-187 (September 2, 1981) | A-102 |

INDEX OF APPENDICES - Continued


| Appendix | | Page |
|---|---|---|
| T | Complaint filed in the United States District Court for the District of Columbia in tion Agreement of the Sheet Metal Industry Trust Fund, et. al., v. Anning-Johnson Company, et al., No. 76-1957 . . . . . | A-103 |
| U | Motion of Defendants E. C. Goldman, Inc., D. W. Browning Contracting Co., Lapin Sheet Metal, R & R Industries, Inc., Von-Aire, Inc. and Tom Clements, Inc. to Dismiss or Stay Proceedings or in the Alternative for summary judgment filed int he United States District Court for the District of Columbia in National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al., v. Anning-Johnson Company, et al., C.A. 76-1957 | A-112 |
| V | Statutes Involved | A-115 |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. _____

D. W. BROWNING CONTRACTING CO., TOM CLEMENTS, INC., E. C. GOLDMAN, INC., LAPIN SHEET METAL, R & R INDUSTRIES, INC., and VON-AIRE, INC.,

PETITIONERS,

v.

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, ET AL.,

RESPONDENTS.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

D. W. Browning Contracting Co., Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc. and in Von-Aire, Inc. ("Petitioners") respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's

judgment of May 4, 1981 in National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI") and Edward J. Carlough, et al., Trustees (of SASMI) v. Commercial Roofing & Sheet Metal, et al., Nos. 78-1761 and 78-2071.[1]

## OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A to this Petition (Pet. App. A, A-1 to A-22). Appeal in this case was taken from two separate orders of the district court. The Memorandum Opinion of the district court which is not officially reported appears as Appendix B, Pet. App. A-23 to A-33 and the order of the district court granting SASMI's motion for summary judgment was entered on May 31, 1978 and is set forth herein as Appendix C, Pet. App. A-34.

---

[1] By order of July 29, 1981 the caption of the case below was amended to limit appellants to the named petitioners herein. See App. P, Pet. App. A-92.

Notice of appeal was filed from the district court judge's order of May 31, 1978 and docketed as 78-1761 in the court of appeals. On August 17, 1978 the district dourt granted SASMI'S motion for attorneys fees (Appendix F, Pet. App. A-38) and on August 25, 1978 the district court entered an order denying reconsideration of the motion for attorneys' fees (Appendix G, Pet. App. A-39). Notice of appeal from the district court's orders granting attorneys fees appear as Appendix H, Pet. App. A-41 and the appeal on the question of attorneys fees was docketed in the court of appeals as No. 78-2071 and was consolidated with the appeal from the grant of defendants' motion for summary judgment, No. 78-1761. The orders of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc appear as Appendix K, (Pet. App. A-57) and Appendix L (Pet. App. A-59).

## JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1981. A timely suggestion for rehearing en banc was denied on June 17, 1981. The Court on September 2, 1981 entered an order

extending time to file petition for writ of certiorari to and including November 14, 1981. (Appendix S, Pet. App. A-102) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This case involves sections 302(a), (b), (c)(5) and (d) of the Labor-Management Relations Act ("LMRA") of 1947, 29 U.S.C. §186(a), (b), (c)(5) and (d) and §502(a) and 502(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132.

The case also involves section 306(a) and 306(b)(1) of the Multi-employer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364, 94 Stat. 1209, which became effective on September 26, 1980, after the case was submitted to the court of appeals for a decision.[2] The relevant sections

---

[2] While the court of appeals affirmed the district court's award of attorneys' fees under section 502(g) of ERISA, 29 U.S.C. §1132(g)(1976), (Pet. App. A-21, SASMI, following the decision

of the new amendments are 29 U.S.C. §1132(g)(1) and (2). Section 306(a) of the ERISA Amendments of 1980 added a new cause of action to ERISA to enforce obligations of employers to make pension fund contributions pursuant to collective bargaining agreements. 29 U.S.C. §1145 (1981).

## STATEMENT OF THE CASE

### Background and Related Pending Litigation

This case was instituted by the SASMI Trust Funds (See Appendix T, Pet. App. A-103) for collection of monies allegedly due to the funds by petitioners. At the time the litigation was commenced, the petitioners, all members of the Central Florida Sheet Metal Contractors Association ("CFSMCA") had been successful in a hearing before an admininstrative law judge of the National Labor Relations Board holding

---

of the court of appeals filed a further motion for attorneys' fees they incurred in preparing the appellate papers (Appendix J, Pet. App. A-55), but SASMI by urging such appellate fees relied upon the 1980 Amendments to ERISA, 29 U.S.C. §1461(e). (Pet. App. A-64 and A-65).

that the Sheet Metal Workers International Association (SMWIA), its Local 493 and the president of the International, Edward J. Carlough, each respondents before the National Labor Relations Board had insisted to the point of impass and strike upon inclusion in a collective bargaining agreement of clauses that involved nonbargainable matters and thereby violated section 8(b)(1)(B) and (3) of the Act. 234 N.L.R.B. 1250 through 1255. The decision of the law judge was predicated upon the fact "that the Board must recognize the purposes and policies of other employment legislation and construe the Act in a manner supportive of the overall statutory scheme." 235 N.L.R.B. at 1253. The particular statutory scheme referred to was an outstanding decision of the United States District Court in Mobile, Alabama, having found the SASMI fund identical to the fund obtained from the Central Florida Sheet Metal Contractors Association to be illegal under section 302 of the Labor Act.

It has been the position of the

petitioners since the filing of their motion to dismiss or stay the instant proceeds or in the alternative for summary judgment (Appendix U, Pet. App. A-112) that SASMI is illegal in that it does not comply with the very strict provisions of section 302(c)(5) and initially asked the district court to stay any action pending the decision of the National Labor Relations Board or alternatively that the district court find the SASMI provisions illegal and therefore dismiss the collection case. Throughout the travel of this case from the district court to the filing of this petition, the further development and travel of the proceedings in the Mobile case, in which SASMI was finally found to be illegal, Mobile Mechanical Contractors Association, Inc. v. Edward J. Carlough, et al., 456 F.Supp. 310, has been inextricably intertwined with this case and has continued to be alleged as a basis for the court below to find SASMI to be illegal. See Petition for Rehearing, Appendix I, Pet. App. A-43 and A-44, fn. 1.

The 24-page decision of Judge Hand

in the Mobile Mechanical Contractors case, 456 F.Supp. 310, is a thorough review of the efforts by Edward J. Carlough, president of the International Sheet Metal Workers Union to foist the SASMI fund through picketing upon sheet metal contractors throughout the United States. Judge Hand found SASMI to be illegal because it violated in a number of respects the mandatory structural provisions of section 302(c)(5) under which jointly administered employer union trust funds are permitted. Judge Hand, in his well-reasoned decision, used as the touchstone for his decision the words of Justice (then Judge) Blackman in Blassie v. Kroger Co., 345 F.2d 58, wherein Judge Blackman stated at p. 72:

> "The intent of section 302 is not served if any contributing employer is deprived of representation in the administration of funds to which it contributes."

See Mobile Mechanical Contractors, 456 F.Supp. 326. Part of the finding of illegality by Judge Hand was that Carlough, president of the international

union, appointed himself as trustee of the original 1973 SASMI Trust Fund and also that Carlough impermissibly controlled the appointment and the selection of the employer-trustees "by choosing the persons entitled to select the SASMI employer trustee[s]." Mobile, 456 F. Supp. 318. In an action brought under §1337 jurisdiction, Judge Hand concluded that the 1973 SASMI Trust failed to provide equal representation of employers and employees in the administration of SASMI and thereby violated section 302(c)(5) by virtue of the impermissible selection procedure. Mobile, 456 F.Supp. 319. Judge Hand also found the SASMI Trust purpose to be violative of section 302(c)(5) by holding:

> "'The special incentive benefit' is not an unemployment benefit (as required under the provisions of 302(c)(5)) nor is it reasonably related to an unemployment benefit because it is payable only to employees who are fully employed." Mobile, 456 F.Supp. 319 (explanation in parenthesis supplied).

Judge Hand held, among other things, that SASMI was illegal by virtue

of a violation of the equal representation provisions of section 302, 456 F.Supp. 325 through 327 and that the trust purpose of underemployment benefits did not comport with the limited exception contained in section 302 for unemployment benefits. 456 F.Supp. 327. Carlough and the sheet metal workers did not appeal the determinations of illegality of SASMI found by Judge Hand but rather limited their appeal to the Fifth Circuit to the correctness of the award of damages against them by Judge Hand as part of his decision. See Attachment to Motion for Rehearing filed with the Court of Appeals in the instant case, Pet. App. A-53 and A-54, the notice of appeal filed by Carlough from Judge Hand's decision.

The appeal filed by Carlough, President of the Sheet Metal Workers International, limited to the issue of damages, but not appealing the legality of SASMI, was docketed in the United States Court of Appeals for the Fifth Circuit as No. 79-2054, which by order of November 7, 1979, was consolidated

by the Fifth Circuit for the purposes of briefing schedule and oral argument with the appeal filed by the Central Florida Sheet Metal Contractors Association, Inc., of which petitioners herein are members, from a decision of the National Labor Relations Board, 234 N.L.R.B. 1238, refusing to exercise jurisdiction over the legality of SASMI and otherwise reversing the decision of the administrative law judge in Central Florida Sheet Metal Contractors Association, Inc. v. N.L.R.B. which was docketed in the Fifth Circuit as No. 79-2396. The Sheet Metal Workers International Association, Carlough and Local 493 were granted intervention in No. 73-2396.

The District Court's Decision

District Court Judge June Green waited for the decision of the NLRB in Sheet Metal Workers International Association and Carlough, et al. (Central Florida Sheet Metal Contractors Association, Inc.) 234 N.L.R.B. 1238, and based upon the NLRB's refusal to exercise jurisdiction over the legality of SASMI under section 302(c)(5) of the Labor Act, also refused to exercise jurisdiction over the legality of SASMI stating:

> "Defendants in this case argue that this Court should exercise the jurisdiction which the Board declined, and make its own assessment of the administrative structure of SASMI in light of the equal representation provision of section 302(c)(5). Implicit in this argument is a request that the Court declare the administrative structure of SASMI to be illegal, and provide, as relief, that defendants need not turn over to SASMI the trust fund payments they agreed to make in the 1974 contract..." Pet. App. A-27

While the district court goes on to suggest that defendants had never filed an answer or counterclaim asking the court pursuant to section 302(e) of the Labor-Management Relations Act to "restrain violations" to equal representation requirement of section 302(c)(5), the court then went on to note:

> "Instead, defendants have raised the equal representation question as a defense in the ERISA action. The Court, however, has found no statutory or decisional authorities to justify the notion that a commitment under an otherwise valid collective bargaining contract between labor and management to

> make certain payments to a welfare and benefits trust fund should be set aside because of violations to equal representation clause." (Pet. App. A-28)

The court, however, goes on to suggest that under the state of the law at that time, section 302(e) cannot be utilized as a defense for payment into a trust fund even if such trust fund violates the equal representation requirements of section 302(c)(5). (Pet. App. A-29 and A-30). Ironically, the court of appeals in the instant case now suggests that such a cause of action under section 302(e) to consider the legality of section 302(c)(5) exists, but it may only be raised in yet another proceeding that these small contractors must bring against these trust funds. (Pet. App. A-12 through 14).

Not only does the district court Judge Green in her decision not accord defendants the opportunity to file an answer where the only pleading they had filed was a motion to dismiss, or stay proceedings (pending the NLRB's decision) or in the alternative for summary judgment (Appendix U attached, Pet. App. A-112), but also erroneously

holds that defendants (petitioners herein) have "waived their right to raise the equal representation question under section 302(c)(5)" (Pet. App A-31) because the NLRB in refusing to exercise jurisdiction on the legality of SASMI also reversed its administrative law judge in his finding that the strike used to secure the inclusion of SASMI in the collective bargaining agreement constituted an unfair labor practice under section 8(b)(3) because SASMI was a nonmandatory and in fact illegal subject of bargaining. The irony and error in Judge Green's waiver holding is that she assumes finality in the NLRB's decision without recognizing that the decision could be appealed to the court of appeals which it has been and assumes erroneously that the NLRB has exclusive jurisidction to decide the legality of SASMI when at another point in her decision she recognizes that the defendants (petitioners herein) alternatively urged concurrent jurisdiction on the legality of SASMI which she refused to exercise. The district court concludes its decision holding that it has no

authority to consider legality under section 302(c)(5) as a defense to an ERISA claim. The court here refuses to consider the failure of the fund to meet the equal representations requirements under section 302(c)(5), the invalidity of the trust purpose dealing with underemployment "special incentive benefits" rather than the limited purpose for unemployment benefits; (Pet. App. A-31 through A-33). The court by separate orders (Appendix F, Pet. App. A-38 and Appendix G, Pet. App. A-39) granted plaintiffs prayer for reasonable attorneys fees under 502(g) of ERISA, 29 U.S.C. 1132(g). Appendix T, ¶2 of the prayer for relief of the complaint. (Pet. App. A-111).

Court of Appeals Decision

The Court of Appeals in essence affirms the decision of the district court and holds that illegality plead as a defense to payments allegedly owing under a 302(c)(5) trust does not require the court to answer the question of illegality because of the overriding policy concerns of continuing payments for the benefit of beneficiaries of the

trust. In arriving at this conclusion the court first misapprehends the decision of the district court below in two material respects. It chooses to ignore that the district court concluded that it did not have jurisdiction under section 302(e) to consider the legality of the defense to SASMI. (Pet. App. A-9 and A-10) The court of appeals further misapprehends the decision of the district court in concluding and premising its arguments thereafter upon the assumption that the only illegality defense cast aside by the district court dealt with the question of equal representation. (Pet. App. A-10) In the aforesaid district court's decision we have noted that the district court also refused to consider the illegality of the trust purpose.

The court of appeals correctly determines that an examination of the pre-ERISA cases is necessary for determining the correct approach in deciding illegality or as the court of appeals chooses to state, the "structural violations of the requirements of section 302(3)(5) of the

LMRA." (Pet. App. A-10). In its prefatory remarks the court of appeals also correctly sets forth that

> "Under the LMRA, employers are generally forbidden to make any payments to representatives of employees. An exception to this general prohibition is provided in section 302(c)(5)..." (Pet. App. A-12)

The first error of the court of appeals is its failure to note that the exceptions to the general prohibition in section 302(c)(5) are to be narrowly and strictly construed. While the court correctly points out that civil enforcement of the standards established in section 302(c)(5) was prohibited in subsection (e) of that section, no where is it written that that is the exclusive method for determining the legality of section 302(c)(5).[3] In fact, the very

---

[3] Judge Hand in Mobile Mechanical Contractors Association v. Carlough, 456 F.Supp. 310 determined consistent with a prior ruling of the Fifth Circuit on rehearing, Mobile Contractors Assn. v. Carlough, 566 F.2d 1219 (5th Cir.

issue in this case is whether the legality or more succinctly the illegality of SASMI may be determined as a defense to a collection suit brought under ERISA where the question of legality would require the court

---

1978) denying rehearing of 556 F.2d 1213 (1977) in which the court of appeals while finding that section 302(e) jurisdiction was limited to remedies for future violations, it left open other equitable jurisdiction that might be available to a court in determining legality of 302(c)(5). Consistent with that grant of jurisdiction, Judge Hand found the instant SASMI trust to be illegal under 28 U.S.C. §1337 as an action "arising under" an Act of Congress regulating commerce.

Similarly, the pending appeal from the refusal of the NLRB to assert jurisdiction over the legality of SASMI is awaiting decision, having been consolidated with appeal from Judge Hand's decision in the Mobile case and involves the legality of the very contract upon which the SASMI trustess here sue as third party beneficiaries. That case is captioned in the Fifth Circuit as Central Florida Sheet Metal Contractors Association v. NLRB and Sheet Metal Workers International Association AFL-CIO and Edward J. Carlough, et al., Intervenors. No. 79 2396.

to interpret the provisions of the Labor Act.

The court of appeals avoids dealing with the legality of the fund under section 302(c)(5) by suggesting that a suit under section 302(e) enjoining the provisions on equal representation would be preferable. The court, however, ignors the fact that these small contractors long prior to the institution of the collection action by the fund trustees immediately filed charges with the NLRB claiming that SASMI was illegal and, therefore, the strike to compel its inclusion in the collective bargaining agreement was likewise illegal.

At the time the instant collection suit was filed, the state of the law included the then pending appeal before the NLRB from a favorable decision that the contractor petitioners herein had won before the administrative law judge of the NLRB. In that circumstance it was clearly an unnecessary duplication to suggest that petitioners should have also filed an injunctive action under section 302(e) to compel a result that had already been achieved. It was for

that reason that petitioners urged district court Judge Green to stay any action in addition to filing its motion to dismiss and motion for summary judgment. Judge Green as already pointed out did in fact stay her decision until the NLRB ruled on that appeal. The fact that the NLRB erroneously determined that it had no collateral jurisdiction to determine the legality of SASMI cannot suddenly be said to shift all the equities and compel the institution of a 302(e) action.

The petitioners, rather than breaching a contract as suggested by the court below, placed the SASMI trust fund monies into escrow. It is the fund trustees, respondents herein, that should have waited to file suit until the legality of SASMI was determined or if they chose to file such suit a defense of illegality must be appropriately held.

The court of appeals in its decision cavalierly ignores the prohibition of section 302(d) which provides for ciminal penalties for employers contributing to non-conforming trusts

under 302(c)(5). Clearly the action of the petitioners herein not to contribute in the face of the questionable legality of SASMI which was then being contested in the federal courts in Mobil and before the NLRB should not have required contributions or another legal contest.

The court of appeals in examining the section 302 common law cases relegates to a footnote the correct holding of the Fifth Circuit in Bricklayers, Masons and Plasterers International Union, Local 15 v. Stuart Plastering Co., 512 F.2d 1017 (5th Cir. 1975). See Pet. App. A-16, fn. 10). In that case the Fifth Circuit found that contributions to an illegal trust could not be made That court properly decided the defense of illegality. The court of appeals in its decision below attempts to distinguish the case by suggesting that the employer's duty in that case was in anticipation of the creation of the trust. We submit that the same anticipation was in fact the essence of the proceedings here because from its beginnings the petitioners had contested

the legality of SASMI before the NLRB and then as a defense in the district court below. At no time has any court yet finally determined SASMI to be legal. Any determinations that have been made thus far have been determinations of illegality or lack of jurisdiction, not a very positive climate for making contributions to a non-conforming trust with the threat of criminal penalties under section 302(d).

A further error of the court is that while properly agreeing (Pet. App. A-18) that strict compliance with section 302(c)(5) is generally required, an exception to such strict compliance exists when the defense of illegality is raised. Becase the "proper flow of benefits to the trusts would be inhibited when the matter is determined in a proceeding other than one for injunctive relief under section 302(e)." (Pet. App. A-18 through A-20).

The court concludes its opinion by affirming the district court's award of attorneys' fees under section 502(g) of ERISA as proper and citing as authority

Mullins v. Kaiser Steel Corp., No. 79-1463, petition for certiorari granted May 4, 1981.

In the timely rehearing petition filed in the instant case petitioners not only called the court's attention to the granting of certiorari in Mullins v. Kaiser Steel, but also that in the instant case there was not merely an alleged illegality defense as in Mullins, but more significantly the legality of SASMI's "equal representation and special incentive provisions" had been declared unlawful by Judge Hand in the Mobile case, 456 F.Supp. at 327. See Pet. App. A-45a.

While the rehearing petition was pending, respondents filed a motion for additional attorneys' fees incurred in the appeal before the court of appeals, (Appendix J, Pet. App. A-55). Respondent SASMI in its memorandum in support of these attorneys' fees, Appendix M (Pet. App. A-61) also suggested the appropriateness of appellate attorneys' fees under the 1980 ERISA amendments making such fees mandatory (Pet.App.

A-64 and A-65). The Court of Appeals granted additional attorneys' fees to SASMI in the amount of $18,037.50 on July 17, 1981 (Pet. App. A-90).

## REASONS FOR GRANTING THE WRIT

### I. THE ISSUES PRESENTED IN THIS CASE ARE SIMILAR TO THE ISSUES PRESENTED IN KAISER STEEL CORPORATION V. JULIUS MULLINS, NO. 80-1345, IN WHICH CERTIORARI WAS GRANTED ON MAY 4, 1981.

In Kaiser Steel, the Court of Appeals for the District of Columbia Circuit affirmed the decision of District Judge June Green refusing to consider defenses of illegality of Section 8(e) of the Labor Act and defenses of illegality under the Sherman Act.

In the instant case, the Court of Appeals similarly affirmed the decision of June Green refusing to consider the defenses of illegality raised by Petitioner herein. In the instant case, the defense of illegality that was raised deals with the strict requirements of trust funds to conform to the provisions of Section 302(c)(5) of the Labor Act. At the time the instant collection suit was filed by the Respondent herein,

Petitioners had already been successful in contesting the legality of the identical clause in an unfair labor practice proceeding before the NLRB. See Sheet Metal Workers, et al. (Central Florida Sheet Metal Contractors Association), 234 NLRB 1230, in which an Administrative Law Judge of the National Labor Relations Board found a strike to compel the inclusion of SASMI in a collective bargaining agreement to be contrary to Labor Law because the provision involved did not comply with the strict requirements of Section 302(c)(5). Accordingly, Petitioners asked Judge Green to stay the collection case pending the decision of the NLRB or alternatively to rule upon the defense of illegality under Section 302(c)(5). Petitioners argued before the District Court Judge that the SASMI Trust was illegal because of its failure to meet the equal representation requirements of Section 302(c)(5). The most complete explanation of the illegality of the SASMI Trust is contained in the decision of District Judge Hand in Mobile

Mechanical Contractors Association, Inc. v. Edward J. Carlough, et al, 456 F. Supp. 310. In that decision of Judge Hand, as well as in the arguments before Judge June Green, it was also urged that the SASMI Fund was illegal because it provided for an under-employment benefit rather than the permissible unemployment benefit under Section 302(c)(5).

As this Court has already accepted the important question as to whether defenses of illegality must be considered in a contract action, it is respectfully suggested that the Court should accept the instant case as the question presented here is almost identical to the question presented in Kaiser v. Mullins, No. 80-1345. In Kaiser, the Court of Appeals for the District of Columbia Circuit gave as one of its reasons for not considering the defense of illegality the fact that Kaiser had waited to raise defenses until a contract action to enforce the clauses was brought.

In the instant case, while the collection action was filed under ERISA, the action is in the nature of a contract action by the Trust Funds seeking to

enforce as third party beneficiaries the provisions of a collective bargaining agreement entered into between the Petitioners through the Central Florida Sheet Metal Contractors Association, of which they are members, with the Sheet Metal Workers International Association and its Local 493. The policy questions in accepting this case and ultimately deciding for Petitioner are perhaps even stronger than those in Kaiser v. Mullins for the Petitioners herein, from the instant that they were coerced into signing the collective bargaining agreement containing SASMI, commenced legal action to challenge the provision. The filing of the unfair labor practice charges with the NLRB resulted in a finding favorable to Petitioners by the Administrative Law Judge. As the complaint herein alleges in Pet. App. T, Petitioners paid the questionable SASMI contributions into specially created escrow accounts.

It has always been the law until this case and Kaiser v. Mullins that courts do not enforce illegal contracts and that an allegation that a contract provision is illegal states a good defense in an action to

enforce that provision, e.g., McMullen v. Hoffman, 174 U.S. 639, 654 (1899). A defense of illegality is available and will bar the Court from enforcing an illegal agreement "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by Federal Law. Kelly v. Kosuga, 358 U.S. 516, 520 (1959). Here, the enforcement of the Funds' collection suit requires "the precise conduct" made unlawful by express Federal Labor Law. Section 302(a) precludes employer payments to trust funds not "in strict compliance" with Section 302(c)(5)(A) and (B).

Here, the illegality of the Trust Fund, upon which the collection suit is premised, is not, as in Mullins[4], a mere allegation as the Court of Appeals repeatedly stated (Pet. App. A, pp. 2, 14, 19 n.16.) The legality of SASMI's "equal

[4] Mullins v. Kaiser Steel Corp., No. 79-1463 (D. C. Cir. September 17, 1980), petition for cert. granted, 49 U.S.L.W. 3824, (May 4, 1981) (No. 80-1345).

representation" and "special incentives" provisions have been declared unlawful by Judge Hand. 456 F. Supp. at 327. In those circumstances, even more so than in Mullins, the Court of Appeals enforces a contribution application "which plainly violates the law specifically designed to prohibit such [contributions]", Mullins, supra, n. 2, dissenting opinion of Judge Wilkey, sl. op. p. 1. The Court of Appeals in this case erroneously considered the contractors' defenses to be a mere allegation. The Court of Appeals ignored the unappealed precedential effect of Judge Hand's decision in holding that an allegation of Section 302(c)(5) infirmities did not state a defense to a collection suit. In so doing, the Court of Appeals nullified express federal policy embodied in Section 302(c)(5)(A) and (B) and indeed ordered the contractors to make payments to a trust fund determined by a member of the federal judiciary to be unlawful. In the Mobile Mechanical Contractors case, supra, Judge Hand recognized the illegality of SASMI vel non and did not require the contractors there to continue to make benefit contributions.

The Court of Appeals concern here for the rights of SASMI beneficiaries (Pet. App. A-19-20) is thus entirely misplaced. Neither in the Taft Hartley Act nor in ERISA did Congress declare these interests to be paramount to the legality of the underlying Taft Hartley pension plan, which creates the contractors' payment obligation. Rather, Congress required, as a prerequisite to contribution "strict compliance with Section 302(c)(5)(A) and (B)." The panel's unwarranted refusal to determine SASMI's legality conflicts strikingly with its conclusion that these Section 302 requirements are indeed relevant to a pension collection suit initiated under ERISA. Pet. App. A-10-12.[5]

---

[5] The panel's decision subjects the contractors to potential criminal sanction by requiring them to make payments to SASMI, the same and identical plan declared unlawful by Judge Hand. Section 302(d).

The Court of Appeals has written the defense of 302(c)(5)(A) and (B) illegality out of federal labor law. By definition, a party can raise a defense of illegality only by waiting until a collection suit is brought against it. The Court of Appeals' broad rationale eliminates a defense which was recognized as properly raised in pre-ERISA collection suits under Section 301 of the Act. Thomas v. Reading Anthracite Co., 264 F. Supp. 339 (N.D. Pa. 1966). As the Court of Appeals recognized (Pet. App. A-10-11), Congress in enacting ERISA in 1974 did not intend to change the existing federal law under Section 302.

If this petition is denied, the Court of Appeals' decision encourages disregard of the requirements of Section 302(c)(5)(A) and (B). Unions going through trust funds can now be certain that collection suits can be initiated without fear that compliance with these requirements need first be made. The Court of Appeals' decision thus permits unlawful conduct and nullifies the public interests legislated by Congress in Section 302 nullifying this very conduct. Moreover, the Court of Appeals' decision encourages litigation by

requiring all parties to questionable Taft-Hartley trusts to promptly initiate legal proceedings even if, as here, any efforts are made to enforce payment obligations to insure that the likelihood of the pension plan can be determined. This proliferation of unnecessary law suits can be simply avoided by allowing contractors to raise the same defense to collection they could raise prior to the enactment of ERISA in 1974. Because the Court of Appeals' decision ignored a federal court decision declaring identical provisions of SASMI unlawful, and because the Court of Appeals' "solution" necessarily multiplies unnecessary litigation, this petition should be granted [6] .

---

[6] The Court of Appeals' solution to the contractors' dilemma remits the contractors to a Section 302(e) suit. This avenue is not "the well established procedure" perceived by the panel (Pet. App. A-14).

## II. THE COURT OF APPEALS' DECISION REFUSING TO CONSIDER VIOLATIONS OF THE LABOR ACT AS A DEFENSE OF ILLEGALITY SHOULD ALSO BE ACCEPTED BECAUSE NOT TO DO SO WOULD BE INCONSISTENT WITH THE DECISIONS OF THIS COURT

The Court of Appeals declined "to exercise jurisdiction" over the contractors' claim that SASMI's trustee's selection provision violated Section 8(b)(1)(b) of the National Labor Relations Act (Pet. App. A-9). In so doing, the Court of Appeals ignored the now settled principle that federal courts have jurisdiction to decide collateral federal labor law questions. Connell Construction Co. v. Plumbers Local 100, 421 U. S. 616 (1975). It has repeatedly been held that a federal court may decide all relevant legal questions to enforce an obligation arising out of the collective bargaining agreement. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 16 (1974). Thus, for example, a federal court has jurisdiction to determine whether a contract violates Section 8(e) of the National Labor Relations Act and is thus unenforceable

even though the party asserting its illegality has not filed a charge with the National Labor Relations Board [7], or to enforce an arbitration award where the defense asserts that the contract clause violates Sections 8(a)(3) and 8(b)(2) of the Act.[8] Accordingly, there is ample Article III power for the Court of Appeals and the District Court to have ruled upon the contractors' contentions. The question of whether SASMI is legal as a matter of federal labor policy is just as much a legal prerequisite to a collection suit as conformity with Section 302(c)(5).

---

[7] United Optical Union, Local 408 v. Sterling Optical Co., 500 F.2d 220 (2d Cir. 1974).

[8] Perma-Line Corp. v. Sign Pictorial and Display, Local 230, 639 F.2d 890 (2d Cir. 1981); accord: IAM Local 1896 v. Brake and Electric Sales Corp., 279 F.2d 590 (1st Cir. 1960).

## III. THE AWARD OF ATTORNEYS' FEES QUESTION SHOULD BE REVIEWED BY THIS COURT BECAUSE IT NOT ONLY RAISES IMPORTANT QUESTIONS ON WHETHER ERISA ACTIONS THAT DO NOT ALLEGE VIOLATIONS OF ERISA ARE MORE AKIN TO THE ATTORNEYS' FEES RULES UNDER SECTION 301 OF THE LABOR ACT BUT ALSO BECAUSE THE POLICY QUESTIONS ON ATTORNEYS' FEES HERE ARE INEXTRICABLY INTERTWINED WITH THE ATTORNEYS' FEES QUESTION ACCEPTED BY THE COURT IN KAISER V. MULLINS, NO. 80-1345

The District Court awarded attorneys' fees under the discretionary provisions of Section 502(g) of ERISA. The Court of Appeals not only affirmed this award in reliance upon the decision of the Court of Appeals in Kaiser v. Mullins, supra, Pet. App. A-21, but also entered a further award of appellate attorneys' fees, which Respondents contended they were entitled to by virtue of the 1980 Amendments to ERISA (Pet. App. A-64, A-65).

In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court limited attorneys' fees awards to prevailing litigants entitled by express federal statute. While SASMI asserts jurisdiction under Section 502 of ERISA, 29 U.S.C. 1132, this is not an ERISA suit. ERISA is not intended to regulate

collective bargaining agreements, or "to control every aspect of the employer-employee relationship or every promise made to employees." Taggert Corp. v. Efros, 475 F. Supp. 124, 125 (S.D. Tex. 1979)[9]. Its purpose is to protect beneficiaries from incompetent or dishonest fiduciaries and "to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards." Murphy v. Inexco Oil Co., 611 F.2d 570, 574 (5th Cir. 1980).

The instant collection suit is in actuality predicated upon Section 301 to enforce an obligation contained in a col-

---

[9] Section 2 of ERISA describes the statutes' purpose as follows:

> [To] protect ... the interests of participants in ample benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries all financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries and employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 U.S.C. Section 1001.

lective bargaining agreement between the contractors and the Sheet Metal Workers Union. There is no separate agreement between the funds and the contrctors requiring the payment of pension and welfare benefits. In this circumstance, it has long been recognized:

> The rights of the trustees [to collection] are entirely derivative. Their right to recover contributions from [employers] is dependent upon the real agreement between [employers] and the Union. Lewis v. Lowry, 295 F.2d 197, 199 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962).

As Judge Wilkey stated in Mullins v. Kaiser Steel Corp., supra, n. 2 sl. op. p. 32, "this suit was not brought to challenge a violation of the pension plan, but was brought to enforce a collective bargaining ... the trustees have confused an effort to comply with ERISA with an effort to enforce it." Here, as in Mullins, supra, there is no allegation that the contractors violated ERISA.

For the reasons stated by Judge Wilkey in Mullins, the Court of Appeals erred in upholding the District Court's attorneys' fees award in this case.

Further support for the inappropriateness of an award of attorneys' fees in the instant case are the recent Amendments to ERISA which in Section 306(a) provide a new cause of action to enforce obligations of employers to make pension fund contributions pursuant to collective bargaining agreements, 29 U.S.C. § 1145 (1981. The Respondents' argument here from the outset on the question of attorneys' fees is as if this action was brought under the new Amendments which not only for the first time created a cause of action under ERISA for the collection of pension moneys but also for the first time provided for a mandatory award of attorneys' fees for such cause of action (see 29 U.S.C. § 1132(g)(1) and (2)). It is a general rule of statutory construction that the enactment of a new Amendment by the Congress is designed to change the original Act and, therefore, it is suggested here that such a cause of action and an award of attorneys' fees were not available to Respondents at the time the action was initiated. Courts generally do not give retroactive application and create financial liability for new

statutory duties that were not in existence at the time the suit was filed [10] .

## CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,

Gerard C. Smetana
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, IL 60603
(312) 346-4515
Counsel for Petitioners

Of Counsel:

KOVAR & SMETANA
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, IL. 60603

Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D. C. 20006
(202) 659-9750

Dated: November 14, 1981
at Chicago, Illinois

[10] See Green v. United States, 376 U.S. 149, 160 (1964) and Union Pacific Railroad Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).

# APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

---

NO._____

---

D. W. BROWNING CONTRACTING CO., TOM CLEMENTS, INC., E. C. GOLDMAN, INC., LAPIN SHEET METAL, R & R INDUSTRIES, INC., and VON-AIRE, INC.

PETITIONERS,

v.

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, ET AL.,

RESPONDENTS,

---

# APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Gerard C. Smetana
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, Ill. 60603
(312) 346-4515
Counsel for Petitioners

Of Counsel:

KOVAR & SMETANA
Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D. C. 20006
(202) 659-9750

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 78-1761 & 78-2071

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, *et al.*

v.

COMMERCIAL ROOFING & SHEET METAL, *et al.*,
APPELLANTS

---

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 76-1957)

---

Argued December 12, 1980

Decided May 4, 1981

this date

*William H. DuRoss, III*, for appellants. *Gerard C. Smetana* and *Burt A. Braverman* also entered appearances for appellants.

*Harry Huge*, with whom *David R. Boyd* and *Krista M. Fogleman* were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before TAMM and MIKVA, *Circuit Judges*, and PHILIP NICHOLS, JR.,* *Judge*, United States Court of Claims.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* In this case we must determine whether the alleged existence of certain "structural defects" in a joint labor-management trust fund constitutes an adequate defense to a collection suit for delinquent contributions brought under section 502 of the Employee Retirement Income and Security Act (ERISA), 29 U.S.C. § 1132 (1976). The National Stabilization Agreement of the Sheet Metal Industry Trust Fund (SASMI) and its trustees initiated this action in the District Court for the District of Columbia for employer contributions due under a collective bargaining agreement between various labor organizations representing sheet metal workers and appellants, members of the Central Florida Sheet Metal Contractors Association, Inc. (CFSMCA or the Association). Appellants contended in the district court that their contractual obligation was unenforceable because the trust fund violated the "equal representation" requirement of section 302(c)(5)(B) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5)(B) (Supp. II 1978). District Judge June L. Green rejected this contention, however, holding, *inter alia*, that an equal representation argument is an insufficient defense to an ERISA claim. Accordingly, she granted plaintiffs' motion for summary judgment and denied defendants' cross-motion for summary judgment. She also awarded plaintiffs attorney's fees pursuant to section 502(g) of ERISA, 29 U.S.C. § 1132(g) (1976). We agree with Judge Green that a remedy exonerating defendant-appellants from their contractual obligation is inappropriately broad in these circumstances and find

---

* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

that her award of attorney's fees in this case was reasonable. We therefore affirm her decision.

## I. Background

### A. *SASMI and the 1974 Agreement*

SASMI is a comprehensive supplemental employment compensation plan developed in 1973 to encourage maximum employment in the sheet metal industry and to minimize the hardships workers endure in periods of less than full employment. As conceived, the plan sought a rough approximation in disposable income between union workers who were fully employed and those unemployed for a major portion of the year due to local economic conditions. Economic assistance in the form of four types of benefits was to be provided to those deemed underemployed. Funding was to be obtained from sheet metal contractors agreeing to SASMI's incorporation into local collective bargaining agreements. *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238, 1239 (1978), *appeal docketed*, No. 79-2396 (5th Cir. June 12, 1979).

In July 1974, representatives of Local 493 demanded that the Association agree to SASMI's incorporation into the collective bargaining agreement then under negotiation. When the Association rejected this demand, and protracted bargaining produced no consensus, the Local and the Sheet Metal Workers' International Association (SMWIA) initiated a strike against CFSMCA members. The Association then acquiesced in SASMI's inclusion, and the parties concluded in October 1974 a contract in which Association members agreed to make monthly payments into the SASMI fund beginning in August 1976.

This apparent resolution of the SASMI dispute was, however, merely temporary. Dissatisfaction with the agreement and the obligations it imposed prompted the

Association to file unfair labor practice charges against the SMWIA and Local 493, and to pay the sums into an escrow account rather than into the SASMI fund. The unfair labor practice charges were ultimately resolved by the National Labor Relations Board (Board or NLRB), and its decision is presently on appeal, *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238, 1239 (1978), *appeal docketed*, No. 79-2396 (5th Cir. June 12, 1979);[1] the refusal to pay prompted the fund and its trustees to bring the suit presented here on appeal.

B. *The District Court Decision*

In October 1976, plaintiffs filed a complaint in the District Court for the District of Columbia, requesting that defendants be restrained from refusing to pay the amounts due the SASMI fund under the 1974 collective bargaining agreement; to this complaint defendants filed neither answer nor counterclaim. Thereafter plaintiffs moved for summary judgment. Defendants responded with a cross-motion for summary judgment[2] in which they alleged that the contract obligations were unenforceable because the administrative structure of the trust did not conform to the equal representation requirement of section 302(c)(5)(B) of the LMRA, and because the trust fund authorization payments for incentive and travel benefits violated section 302(c)(5)(A).[3]

---

[1] Although originally docketed in the United States Court of Appeals for the Fifth Circuit, this case was recently transferred to the newly created Eleventh Circuit.

[2] Defendants' motion was actually entitled "Motion to Dismiss or Stay Proceedings or in the Alternative for Summary Judgment." Judge Green denied the motion as one for summary judgment, and we will refer to it as such in this opinion.

[3] The statute provides in relevant part:

> (c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative,

Defendants argued that these violations rendered SASMI a nonmandatory subject of bargaining for which coercive strike pressure could not be utilized. The strike initiated by SMWIA and the Local to compel the Association's acceptance of SASMI was, therefore, an unfair labor practice which vitiated the payment obligations of CFSMCA members under the 1974 agreement.

District Judge June L. Green declined, however, to assess the structure of SASMI in light of the requirements of section 302(c). Instead, she noted, the suit before the court was a collection action; defendants had not requested, by answer or counterclaim, that the court exercise its jurisdiction under section 302(e)[4] to "re-

---

for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, . . . .

29 U.S.C. § 186(c) (Supp. II 1978).

[4] Section 302(e) states:

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this

strain violations" of section 302(c)(5). Therefore, defendants' allegations could be evaluated only with regard to their sufficiency as a defense to plaintiffs' ERISA claim. After considering defendants' allegations in that posture, Judge Green found them inadequate to sustain the grant of relief afforded by summary judgment. Accordingly, she denied defendants' motion for summary judgment and granted that of plaintiffs. *National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Anning-Johnson, Co.*, No. 76-1957 (D.D.C., filed May 31, 1978), Joint Appendix (J.A.) at 1-6.

The district judge justified her decision on four grounds. First, she found "no statutory or decisional authorities to justify the notion that a commitment under an otherwise valid collective bargaining contract between labor and management to make certain payments to a welfare and benefits trust fund should be set aside because of violations of the equal representation clause." J.A. at 4. Second, she believed that the relief provided defendants by summary judgment—"total absolution" from their contractual obligations—was inappropriately drastic. Even if the court were to find the trustee selection method for SASMI in violation of section 302 requirements, it would not "use its equitable power to excuse defendants from making their payments." *Id.* Third, payment avoidance could not be justified as a proper exercise of a district court's section 302(e) authority to restrain violations. This authority is equitable in nature, the district judge stated, and a court-ordered abrogation of the 1974 contract is a remedy which lies outside the scope of the court's equitable powers. Moreover, a grant of such relief in this case would be particularly

---

section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

29 U.S.C. § 186(e) (Supp. II 1978).

inappropriate since the NLRB had ruled that the SASMI fund and the precedent union activity were not invalid as a matter of labor law. J.A. at 4-5. Finally, the district judge ruled that these defendants had waived their right to raise the equal representation question on the ground that the NLRB had determined the SASMI provision and the strike initiated to induce its acceptance to be permissible incidents of bargaining. Because defendants had entered into a collective bargaining agreement, upheld in relevant part by the NLRB, they were estopped from asserting the same alleged statutory noncompliance as a defense to the collection suit. J.A. at 5. All of these reasons or, indeed, any of them, Judge Green concluded, supported her disposition of the parties' motions.[5] J.A. at 6.

Following this decision, plaintiffs moved for, and were granted, attorney's fees and expenses. J.A. at 8. Defendants subsequently filed this timely appeal.

## II. Discussion

### A. *Appellants' Contentions*

Appellants seek relief in this court on two grounds. First, appellants contend that because the SASMI plan did not provide for the Association's direct selection of management trustees for the SASMI fund, labor's strike to compel SASMI's acceptance was essentially coercion of the Association's selection of its collective bargaining representatives. Such coercion is an unfair labor practice under section 8(b)(1)(B) of the LMRA, 29 U.S.C. § 158(b)(1)(B) (1976), and would invalidate any col-

---

[5] On the basis of the remedy and waiver considerations, Judge Green also held that plaintiffs' section 302(c)(5)(A) allegations could not constitute an adequate defense to plaintiffs' claim, "whether or not . . . considered in tandem with defendants' primary claim." J.A. at 6.

lective bargaining agreement resulting from such practice. Invalidation of that agreement would, in turn, render unenforceable the payment obligations it imposes. Accordingly, appellants urge us to determine that the trustees of the SASMI fund are representatives of their appointing parties, and to reverse the district court on that basis.

In the alternative, appellants request that we remand the case to the district court for a determination of their equal representation claim. They assert that the district court erroneously declined to exercise its power to evaluate alleged violations of section 302(c)(5) requirements. They contend that the scope of the enforcement sections of ERISA must be construed consistently with the federal law developed in the collection of actions initiated pursuant to section 302 of the LMRA. Under that law, appellants state, "it [is] well settled that delinquent contributors [can] raise defenses directly related to the structure of the trust fund." Brief for Appellants at 16. Where such defenses actually establish the structural defects they allege, moreover, appellants argue that courts have consistently held that employers have a statutory duty to refrain from making contributions. The district court's failure to heed this pre-ERISA law, appellants contend, requires this court to reverse and remand for proper consideration of their section 302 defenses.

Appellants' final challenge is directed toward the district court's award of attorney's fees. They argue that this case presents an issue of first impression for this court, and that an award of fees in such circumstances is an abuse of discretion. They further assert that the award cannot be premised upon the obligation imposed by an illegal trust agreement and that, in any event, such an award is improper here because SASMI's expenses are "self-inflicted." Reply Brief for Appellants at 5 n.4.

B. *Separating the Wheat from the Chaff: Issues and Non-Issues*

We believe an examination of appellants' contentions makes a preliminary statement imperative. Before addressing the issues presented in this case, therefore, we state briefly what is *not* at issue here. Initially, we must decline appellants' invitation to determine whether trustees of the SASMI fund are collective bargaining representatives of their respective appointing parties within the meaning of section 8(b)(1)(B) of the NLRA. Despite appellants' generous grant of jurisdiction we may not decide a question that is not before us.

In charges filed before the Board, the Association pressed its argument that the trustee selection clause made the strike activity of SMWIA and the Local coercive because trustees are collective bargaining representatives for section 8(b)(1)(B) purposes. The Board, however, rejected this argument. It found that the primary function of the SASMI trustees was the administration of the SASMI trust agreement rather than the conduct of collective bargaining negotiations, and that such trustees are required to act solely in the interests of the beneficiaries of the trust fund. The Board concluded, therefore, that SASMI trustees were not collective bargaining representatives within the meaning of section 8(b)(1)(B). *Sheet Metal Workers' International Association*, 234 N.L.R.B. at 1246-48. This decision, as we noted earlier, was not appealed to this court. Since it was not then offered for our consideration, we will not now presume, in this collateral manner, to exercise jurisdiction over it. Instead, we leave the issue's determination to the court before which it has been properly presented.

Secondly, we believe that appellants have misapprehended the nature of the district court's conclusion. The district judge did not decide that a district court had no jurisdiction over allegations of section 302(c)(5)

infirmities. Rather, as she explicitly recognized, J.A. at 4, a district court has express jurisdiction under section 302(e) of the LMRA to "restrain violations" of section 302 requirements. Appellants chose not to invoke that jurisdiction, however, apparently relying upon the alleged equal representation violation as a total defense to SASMI's claim for delinquent contributions. Judge Green determined that this asserted defect was *insufficient* to obviate the Association's contractual obligation; she did not refuse appellants their requested relief on jurisdictional grounds, as they now contend. With these preliminary observations in mind, we turn now to the issues before us.

### C. *ERISA and LMRA: Their Intersection and Its Application to This Case*

In deciding whether appellants may successfully defend a collection action brought under section 502(a) of ERISA by asserting violations of the structural requirements of section 302(c)(5) of the LMRA, we must first determine whether pre-ERISA decisions interpreting section 302(c)(5) are applicable to an ERISA claim. An examination of ERISA and its legislative history leads us to agree with appellants that this authority is indeed relevant to the disposition of this case. The pertinent section of the statute, section 514(d), explicitly states that

> [n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d) (1976). As this court recently held, "this is a strong, comprehensive, express statement that ERISA is not to be read as displacing by implication any pre-existing federal legislation." *Air Line Pilots Association, International v. Northwest Airlines, Inc.*, 627 F.2d

272, 276 (D.C. Cir. 1980). The legislative history, moreover, provides additional support for this conclusion. In its discussion of the problems with existing pension legislation, for example, the Senate Committee on Labor and Public Welfare remarked in its Report on the Retirement Income Security for Employees Act of 1973 (the Senate version of the later-enacted ERISA) that

> [t]he Labor-Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.
>
> . . .
>
> The proposed bill would [] establish minimum standards of vesting, funding, and fiduciary conduct and also provide for voluntary portability of earned pension credits and a system of compulsory benefit insurance to protect the security of pension rights.

S. REP. No. 93-127, 93d Cong., 1st Sess. 4-5 (1973), *reprinted in* I LEGISLATIVE HISTORY OF THE EMPLOYMENT RETIREMENT INCOME AND SECURITY ACT at 590-91 (1976).

These sources reveal no congressional intent to undermine the validity of existing legislation, or, inferentially, of its construction by the judiciary. Instead, Congress attempted in ERISA to fill those gaps in the worker protection provided by pension funds created pursuant to such legislation. Because, therefore, judicial interpretations of section 302(c)(5) would be plainly relevant to this case had it been initiated prior to ERISA's enactment, and Congress expressly indicated its intent not to disturb existing law, we proceed to an examination of the section 302(c)(5) authority developed by the federal courts.

Under the LMRA, employers are generally forbidden to make *any* payments to representatives of employees. An exception to this general prohibition is provided in section 302(c)(5), the result of a compromise reached between two competing concerns. One concern was that a flat prohibition against employer payments would destroy existing employee welfare funds; the other was that, absent some statutory control, union officials would remain free to abuse the unfettered discretion they then exercised over such funds.[6] Under the compromise, employers were permitted to contribute to those trusts meeting certain requirements specified within the subsection. By thus structuring the exception Congress could assure the continued flow of benefits to employees under existing plans, while at the same time guarding against those abuses it saw arising from exclusive union control of trust funds.

Civil enforcement of the standards established in section 302(c)(5) was provided for in subsection (e). In that subsection Congress granted federal district courts equitable jurisdiction to "restrain violations of this sec-

---

[6] Senator Ball, who introduced section 302, explained its purpose:

> [T]he sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of employers who contribute to them, and that they shall not degenerate into bribes. . . . I myself think that unless we make sure that such funds, when they are established, are really trust funds and are actually used for the benefit to [sic] employees specified in the agreement, there is very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes . . . and that they will in fact become rackets.

93 CONG. REC. 4805 (1947), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1305 (1948).

tion. . . ." 29 U.S.C. § 186(e) (Supp. II 1978). The federal courts have agreed that this jurisdictional provision permits them to grant parties injunctive[7] and, in some instances, declaratory[8] relief in restraining these violations. Moreover, although the scope of section 302(e) jurisdiction has not yet been fully defined,[9] at least this much is certain:

> a federal district court does have jurisdiction under the section to enforce a trust fund's compliance with the statutory standards set forth in subsection (c)(5) by eliminating those offensive features in

---

[7] *See, e.g.*, Quad City Builders Ass'n v. Tri City Bricklayers Union No. 7, 431 F.2d 999 (8th Cir. 1970); Employing Plasterers' Ass'n v. Journeymen Plasterers' Protective & Benevolent Society Local 5, 279 F.2d 92, 97 (7th Cir. 1960).

[8] In Mobile Mechanical Contractors Ass'n v. Carlough, 566 F.2d 1219 (5th Cir. 1978), *denying rehearing of* 566 F.2d 1213 (1977), for example, the court stated in its denial of a petition for rehearing that "[w]hether a district court can grant declaratory relief under Section 302(e) jurisdiction depends . . . upon whether such relief, under the circumstances, looks to the future or to the past." *Id.* at 1219. The court concluded that section 302(e) jurisdiction was limited to remedies for future violations.

[9] Some courts believe that section 302(e) jurisdiction is limited to the adjudication of structural violations, and does not justify their exercise of jurisdiction over the administration of section 302(c)(5) trusts. *See, e.g.*, Bowers v. Moreno, 520 F.2d 843 (1st Cir. 1975); Fiorelli v. Kelewer, 339 F. Supp. 796 (E.D. Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973). Others have interpreted the jurisdictional grant more liberally. *See, e.g.*, Burroughs v. Board of Trustees of Pension Trust for Operating Engineers, 542 F.2d 1128 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977), in which the court held that a district court had jurisdiction under section 302(e) over the alleged failure of trustees to administer a retirement fund in a manner consistent with fundamental due process because such failure was tantamount to a basic structural defect.

> the structure or operation of the trust that would cause it to fail to qualify for a (c)(5) exception.

*Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222, 225 (3d Cir. 1977).

Consistent with this interpretation, courts have entertained challenges to the structural validity of a trust fund. Where, as here, these allegations assert that employers and employees are unequally represented in the joint administration of an employee welfare fund, a court will look beyond the equality signified by equal numbers to determine whether the administrative structure reflects "meaningful adherence to the Congressional command." *Id.* at 227. If it finds that the administration creates the potential for union domination, the court will take the appropriate equitable measures to ensure compliance with the equal representation standard. *See, e.g., id.; Quad City Builders Association v. Tri City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970).

Appellants in this case could have followed this well-established procedure in determining the structural validity of the SASMI fund. They could have instituted a suit under section 302(e), requesting the district court to enjoin any existing violations of the structural requirements of section 302(c)(5). Appellants chose, however, to disavow their contractual obligation and to assert their claims of structural defects as justification for this disavowal. When the district court subsequently rejected this attempted justification, appellants filed this appeal, claiming that the district court wrongly ignored the federal common law developed under section 302.

Pausing briefly to observe that appellants are hardly in a comfortable position to accuse anyone of ignoring the relevance of section 302 law, we proceed to an examination of their proposition that under that law "delinquent contributors [can] raise defenses directly related to the structure of the trust fund." Brief for Appellants at 16.

To support this proposition, appellants refer us to the cases of *Thomas v. Reading Anthracite Co.*, 264 F. Supp. 339 (M.D. Pa. 1966), and *Ramsey v. United Mine Workers Welfare & Retirement Fund*, 231 F. Supp. 909 (E.D. Tenn. 1964); neither case, however, lends credence to appellants' claim. In *Ramsey*, plaintiffs were coal companies seeking to recover payments made to an employees' welfare trust fund established pursuant to a collective bargaining agreement between the plaintiffs and the United Mine Workers of America. As one basis for their requested recovery, plaintiffs argued that the agreement and its accompanying declaration of trust did not sufficiently specify the basis upon which employer contributions would be paid, and therefore violated one of the requirements of section 302(c)(5). The court rejected this argument. Stating that the requirements of subsection (c)(5) should be interpreted as a part of the entire legislative plan, the court concluded that "the establishment of a legally enforcible (sic) method of arriving at a detailed basis for distributing welfare trust funds is sufficient to comply with Section 302(c)(5)," *id.* at 913, and that the challenged agreement provided such a method. Accordingly, the court granted defendants' motion for summary judgment and dismissed the case. We agree with appellants that the *Ramsey* court actually determined the trust fund to be in compliance with the requirements of section 302(c)(5). As we emphasized earlier, however, it is undisputed that a district court may evaluate challenges to the structural validity of a trust fund when such challenges are presented in the proper posture. In *Ramsey*, *plaintiffs* alleged that the trust fund failed to comply with section 302(c)(5)'s requirements; they did not attempt to defend a collection action brought by the fund on that basis. We do not, therefore, find *Ramsey* particularly helpful to appellants' position.

The *Thomas* case similarly fails to sustain appellants' proposition that section 302(c)(5) violations can be successfully maintained by delinquent contributors defending a collection action. *Thomas*, however, is not irrelevant to our disposition; in fact, it is the only decisional authority which speaks directly to the issue we presently address.[10] In *Thomas*, plaintiffs were trustees of the Anthracite Health and Welfare Fund. They brought suit against the defendant company for royalty payments allegedly owed them under certain Anthracite Wage Agreements. Defendants argued that they could not legally make the promised payments because the fund did not comply with the requirements of section 302. One of the violations they alleged was that employers and employees were not equally represented in the fund's administration. In its assessment of this allegation, the district court reviewed Supreme Court precedent which it felt reflected the Court's overriding concern for the innocent beneficiaries of employee welfare plans. In light of this concern and of the remedy "readily available under Section 302(e)," *id.* at 348, for "situations such as we have here," *id.* at 347, the district court concluded: "the employer's obligation to pay royalties [may not] be diminished by the fact that the plan *adopted by the employer and the Union to receive and administer the Fund*[] does not fully qualify with the Act. . . ." *Id.* at 348.

---

[10] We believe the situation presented here differs significantly from that presented by Bricklayers, Masons and Plasterers Int'l Union, Local 15 v. Stuart Plastering Co., 512 F.2d 1017 (5th Cir. 1975). There the employer-defendants argued, and the court agreed, that they had no obligation to make contributions to an employer welfare fund where the trust agreement was neither executed nor signed by the defendants. In making this decision the court remarked that "the policies of the section [302] . . . cannot be accomplished if an employer's duty to make payments arises *in anticipation* of the creation of a trust fund that, as here, may never be created in fact." 512 F.2d at 1028. In this case there is no dispute as to the existence of the fund.

After careful consideration, we find that the circumstances before us merit an application of the *Thomas* court's conclusion. Appellants would have us remand this case to the district court for a thorough assessment of their equal representation claim. If we do not remand or, alternatively, ourselves assess that claim, appellants argue that their complaint will go unheard. In support of this argument, appellants state that the NLRB has refused to determine the merits of their allegation on the ground that the statute requires its adjudication by a district court; that our district court has also refused jurisdiction over the matter;[11] and that the Fifth Circuit, the jurisdiction in which these contractors do business, has in other cases refused to provide the type of declaratory relief appellants seek.[12] Appellants further assert that Congress intended section 302(c) trusts to comply strictly with the requirements specified in subsection (c)(5). They note the criminal penalties to which employers contributing to nonconforming trusts are subject,[13] and point to

---

[11] We find it necessary to make clear our disagreement with the district court's determination that defendants waived their right to raise the equal representation question because the NLRB found the bargaining agreement to be legal under the NLRA. As the Board rightly determined, and the district court itself recognized, the federal district courts are the proper forum for the adjudication of structural allegations.

[12] For this last proposition appellants cite Mobile Mechanical Contractors Ass'n, Inc. v. Carlough, 566 F.2d 1213 (5th Cir. 1977). In light of our disposition of this case, we find it unnecessary to address this assertion.

[13] Section 302(d) provides:

> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

29 U.S.C. § 186(d) (1976).

the acknowledged right of employers to enforce statutory compliance. *See, e.g., Denver Metropolitan Association of Plumbing, Heating, Cooling Contractors v. Journeymen Plumbers & Gas Fitters Local 3 & Pipefitters Local 208*, 586 F.2d 1367, 1372 (10th Cir. 1978); *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965); *Employing Plasterers' Association v. Journeymen Plasterers' Protective & Benevolent Society, Local 5*, 279 F.2d 92, 97-98 (7th Cir. 1960). On the basis of these factors, appellants contend that our failure to ensure proper consideration of their claim would be contrary to the congressional intent underlying the creation of section 302(c)(5) standards.

We disagree. Although strict compliance with the qualifications of section 302(c)(5) is generally required,[14] it is not an end in itself but a means of ensuring that "payments made by employers [are] used to provide employees with the benefits to which they are entitled under a collective bargaining agreement." *Bricklayers, Masons and Plasterers International Union, Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1025 (5th Cir. 1975). To ensure this proper flow of benefits, Congress endowed the federal district courts with the equitable power to restrain violations of section 302(c)(5) requirements. These courts have recognized that their exercise of this power must be consistent with the underlying congressional purpose of protecting trust beneficiaries. Thus, where possible, courts have acted to restrain section 302(c)(5) violations without disturbing the employer's payment obligations.[15]

---

[14] *See, e.g.*, Bricklayers, Masons and Plasterers Int'l Union, Local 15 v. Stuart Plastering Co., 512 F.2d 1017, 1024-25 (5th Cir. 1975); Moglia v. Geoghegan, 403 F.2d 110, 116 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969).

[15] *See* Quad City Builders Ass'n v. Tri City Bricklayers Union No. 7, 431 F.2d 999 (8th Cir. 1970), discussed at p. 19 of text *infra*, and Costello v. Lipsitz, 547 F.2d 1267, 1278 n.38 (5th Cir.), *cert. denied*, 434 U.S. 829 (1977), in which the

Equal representation violations seem particularly susceptible of this type of accommodation. Unlike other defects such as the absence of a written agreement, or the absence of a detailed basis for employer payments, an equal representation defect does not practically preclude continued employer contributions.[16] In *Quad City Builders Association v. Tri City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970), for example, the court determined that a trust fund in which the employer trustees were appointed by ten mason contractors, eight of whom were active union members who worked occasionally as employees, did not comply with the equal representation requirement. On that basis, the court enjoined the violation and instructed the parties to agree upon a lawful plan for trustee selection. It also held, however, that in the interim preceding election of appropriate trustees, the present trustees could continue to receive contributions to the fund subject to court supervision of disbursements. *Id.* at 1004.

We agree that an equal representation violation need not preclude an employer's fulfillment of his contractual obligation. Moreover, we believe that the primacy of

---

court, after declaring that the trust structure violated the equal representation standard of section 302(c)(5), carefully noted:

> Simply because we find that § 10 of the Trust Agreement violates § 302(c)(5)(B), this does not and is not to be construed as a determination that the entire Trust Agreement and Trust Fund structure violate § 302. Section 17 of the Trust Agreement contains a severability provision. . . . This severability clause and § 10's limited impact—its correction cures the defect—allows the Trust Agreement and Trust Fund to remain.

[16] We believe this same observation holds true as to appellants' section 302(c)(5)(A) allegation and accordingly hold that in the circumstances of this case such an allegation is not an adequate defense to appellees' ERISA action.

protection for trust beneficiaries in the congressional scheme compels the conclusion that appellants may not successfully assert an equal representation defect as a defense to appellees' collection action. In addition to the fact that this conclusion best promotes Congress's interest in a continued flow of benefits, two related factors make this disposition particularly appropriate here: appellants' failure to invoke the well-established forum for the resolution of structural allegations, and the delay in asserting such allegations. As we have been at some pains to point out in this opinion, appellants had, and indeed still have, recourse to the civil preventive remedy provided in section 302(e). The importance of this remedy to employers has been clearly expressed:

> Unilateral termination by the employer-contributors of allegedly illegal contractual obligations may subject them to an action for breach of the collective bargaining agreement. The benefit conferred . . . by a test of the legality of the welfare funds and a restraint of violations of Section 302 is the bestowing of legal posture on payments and on the administration of welfare funds and the removal of the onus of participation in a continuing violation which may subject the Association to possible criminal sanctions.

*Employing Plasterers' Association v. Journeymen Plasterers' Protective & Benevolent Society, Local 5*, 279 F.2d 92, 99 (7th Cir. 1960).

Despite the acknowledged importance of this remedy, however, appellants chose not to avail themselves of its benefits—either during the two-year interval between the conclusion of the bargaining agreement and the commencement of the agreed-upon payments, or when the payment obligation matured. They simply breached that obligation. Indeed, only after the trustees of the SASMI fund brought a collection action for the overdue payments did appellants raise their equal representation objection in the district court, and even then the challenge

was made in the context of a cross-motion for summary judgment rather than in a separate suit or counterclaim brought pursuant to subsection (e). By thus electing to forego the proper opportunities to resolve their equal representation claim, appellants have created their present distress.[17]

D. *Attorney's Fees*

We reject appellants' contention that the district court's award of attorney's fees to appellees was improper. Under section 502(g) of ERISA, 29 U.S.C. § 1132(g) (1976), a court may award, in its discretion, a reasonable attorney's fee and costs in any action brought under the Act by a fiduciary, beneficiary, or participant. The SASMI trustees are fiduciaries obligated by ERISA to discharge their duties for the purpose of providing benefits to participants and their beneficiaries. *See* 29 U.S.C. § 1104(a)(1)(A) (1976). Pursuant to this obligation these trustees instituted an action to collect overdue employer contributions. The district court exercised its discretion to award the fees and costs attendant to that action, and we can find no abuse of that discretion. *See Mullins v. Kaiser Steel Corp.*, No. 79-1463, slip op. at 33-34 (D.C. Cir. Sept. 17, 1980), *petition for cert. filed*, 49 U.S.L.W. 3620 (U.S. Feb. 10, 1981) (No. 80-1345).

## III. Conclusion

Appellants have argued to this court that the congressional interest in strict compliance with the statutory

---

[17] As the *Thomas* court observed:

> The employer is not relieved of his duty to correct inequities or allegedly illegal facets of the Fund and cannot blandly sit by . . . and assert that he has no obligation to honor his contractual commitment . . . .

264 F. Supp. at 348.

standards of section 302(c)(5) demands that we provide a forum for their equal representation challenges. As we have stated, however, the more significant congressional interest lies in the protection of trust beneficiaries by securing for them the benefits to which they are entitled under a collective bargaining agreement. In this case this interest is appropriately served by our conclusion that appellants' claim of an equal representation defect cannot constitute an adequate defense to appellees' collection action. Moreover, despite appellees' assertion to the contrary, they have not been thereby deprived of a forum for their allegations. Rather, appellants have available to them, as they have had available for the past four years, the long-established remedy specifically provided in subsection (e). Finally, we conclude that the district court properly exercised its authority under ERISA to award attorney's fees. The decision of the district court is therefore

*Affirmed.*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Plaintiffs, | ) | Civil Action No. 76-1957 |
| v. | ) | |
| ANNING-JOHNSON COMPANY, et al., | ) | |
| Defendants. | ) | |

OPINION

The parties in this case have filed cross motions for summary judgment. For the reasons stated below, the Court grants plaintiffs' motion and denies defendants'.

The material facts are not in dispute. This action is brought pursuant to § 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. Plaintiff National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI") is a labor-management health and welfare trust fund created pursuant to Section 302(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c). The other plaintiffs are individual Trustees of the

SASMI. Defendants are sheet metal contractors who agreed to make payments into SASMI beginning August 1, 1976, pursuant to a collective bargaining contract entered into on October 21, 1974 between the Central Florida Sheet Metal Contractors Association and certain labor organizations representing sheet metal workers.

The terms of the contract provide for monthly contributions by the contractors beginning in August 1976, and continuing for the duration of the contract. Defendants, however, have declined to deposit the requisite funds into SASMI but have insted placed the money in escrow accounts. The contractors claim that their acceptance of SASMI as part of the 1974 collective bargaining agreement was coerced by an illegal strike, and that both the administrative structure and benefits program included in SASMI violate the law. They have refused to make payments to SASMI until their contentions are resolved.

In defendants' memorandum in support of their motion to dismiss or stay

proceedings or in the alternative for summary judgment, filed November 19, 1976, they stated,

> The only issue here is whether the SASMI plan which the Plaintiffs here seek to enforce was obtained by strike and other coercive conduct which is made an unfair labor practice by the National Labor Relations Act. Only the NLRB has jurisdiction to resolve that question. At 4.

As the parties are aware, the NLRB has now addressed this very issue. On March 8, 1978, the Board handed down a Decision and Order in an unfair labor practices case filed before the Board by the Central Florida Sheet Metal Contractors Association, the trade group for the parties who are defendants in this action. The Association asked the Board to rule that the strike which led to the collective bargaining agreement signed October 21, 1974 violated the National Labor Relations Act's section 8(b)(3), 29 U.S.C. § 158, which bars unfair labor practices.

In the March 8 decision, a three-member panel of the Board reversed a ruling on an Administrative Law Judge which had held that the strike was an unfair labor practice. The Judge had based his conclusion on a finding that the trustee selection provision of SASMI violated § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5)(B), which requires that employees and employers be "equally represented" in the administration of health and welfare trust funds. The Judge reasoned that since SASMI was illegally administered, a strike to obtain its inclusion in a collective bargaining contract was an unfair labor practice.

Pursuant to his authority to prescribe remedies for the violations, the Judge had ordered that the SASMI plan be deleted from the 1974 contract. He also gave the contractors involved the option of vacating the entire 1974 agreement and beginning the collective bargaining process over again.

The panel based its reversal of the Judge's actions on jurisdictional grounds. Subsection 302(e) of the Labor Management Relations Act, 29 U.S.C. § 186(e), gives

the federal district courts authority to "restrain violations" of the provisions of the section, among which is the equal representation requirement. The Board ruled that no basis exists to find the Board possesses jurisdiction concurrent with that of the courts to regulate adherence to the requirement.

The effect of the Board's reasoning is that even if the equal representation provision of § 302 was violated by the administratve structure of SASMI, the strike used to secure inclusion of SASMI within the collective bargaining agreement cannot constitute an unfair labor practice within the meaning of § 8(b)(3) of the National Labor Relations Act. A second result flowing from the Board's lack of jurisdiction is that the remedies available to the Board cannot be imposed in this situation.

Defendants in this case argue that this Court should exercise the jurisdiction which the Board declined, and make its own assessment of the administrative structure of SASMI in light of the equal representation provision of Section 302(c)(5).

Implicit in this argument is a request that the Court declare the administrative structure of SASMI to be illegal, and provide, as relief, that defendants need not turn over to SASMI the trust fund payments they agreed to make in the 1974 contract. Several considerations persuade the Court not to grant such relief.

At the outset, the Court notes that the only claim pending before it is a suit by the SASMI trust fund and its Trustees pursuant to the Employee Retirement Income Security Act. Defendants have never filed an answer or a counterclaim in this suit asking the Court to act pursuant to § 302(e) of the Labor Management Relations Act to "restrain violations" of the equal representation requirement of § 302(c)(5). Instead, defendants have raised the equal representation question as a defense in the ERISA action. The Court, however, has found no statutory or decisional authorities to justify the notion that a commitment under an otherwise valid collective bargaining contract between labor and management to make certain payments to a welfare and benefits trust fund should be

set aside because of violations of the equal representation clause.

On its face, such a remedy seems inappropriately drastic. Payments to benefits funds by employers for the use of their employees are by now staple features of the economic relationship between management and labor in many industries. Even if the Court were to find that the method for selecting the Trustees for the fund involved here somehow violated the equal representation requirement of § 302, it would not use its equitable power to excuse defendants from making their payments. The Court would only consider relief which fell short of negating the entire SASMI agreement and eroding the solvency of the fund. However, defendants have not requested or suggested any relief other than total absolution from their obligations, and they have "requested" this complete relief only in the sense that their motion for summary judgment necessarily implies it.

Even if the Court had been inclined to consider the relief requested, the statute involved would not permit it. Paragraph

(e) of § 302 authorizes federal district courts to "restrain violations" of provisions such as the equal representation requirement. The federal Circuits have disagreed as to whether this grant of equitable authority is limited to the power to enjoin future violations of § 302 or extends also to the power to order certain remedial actions by trustees. See e.g., Snider v. All State Administrators, Inc., 481 F.2d 387, 390 (1973); Blassie v. Kroger Company, 345 F.2d 58 (1965); Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552, 558 (1962). All Circuits are agreed, however, that the authority granted in § 302(e) is equitable only. Any relief which permitted defendants to avoid payments into SASMI would amount to a court-ordered abrogation of the contract made October 21, 1974, and such action lies beyond the bounds to which equitable remedies may extend. Such relief would be particularly objectionable in the wake of the NLRB's conclusion that the SASMI fund, and the union activity used to promote it, are not invalid as a matter of labor law.

The Court notes, finally, that these defendants have waived their right to raise the equal representation question. The NLRB found that the portion of the 1974 contract which includes SASMI and the strike used by the labor organizations to induce its acceptance were permissible incidents of collective bargaining. Defendants, who were represented in the bargaining process by the Central Florida Sheet Metal Contractors, are thus parties to a valid contract which stipulates, among other things, a particular method for selecting administrators of the SASMI fund. Even if the method did not allow for equal representation in some abstract sense, defendants are estopped from raising the question in light of the NLRB's decision.

To summarize, the Court has concluded that (1) no authority exists for the proposition that an "equal representation" complaint is a sufficient defense to an ERISA claim; (2) a remedy which exonerated defendants from having to meet their payments obligations under the 1974 contract would be inappropriately broad; (3) in any event, the statutory provision which authorizes the Court to act in these situations does not permit the remedy requested; and (4) in light of the NLRB's

which authorizes the Court to act in these situations does not permit the remedy requested; and (4) in light of the NLRB's rulings, defendants have waived their right to raise the equal representation question. The Court emphasizes that in its view any one of these factors is sufficient to require the rejection of defendants' arguments and the grant of summary judgment to plaintiffs, considered together these factors compound the strength of plaintiffs' position.

The Court therefore will not consider the merits of defendants' argument that SASMI's trustee selection procedures, as amended in December 1974, violate the equal representation provision of § 302(c)(5)(B).

Defendants have also raised two subsidiary questions. They argue that the equal representation provision is also violated by a provision in the SASMI trust plan requiring a new participating employer to "irrevocably designate" the incumbent trustees as its representatives in the administration of the trust. Finally, they argue that a separate provision of § 302(c) forbids the use of trust funds for the

"Special Incentive Benefits" and "Special Travel Benefits" features of the SASMI plan. Neither of these contentions are sufficient defenses to plaintiffs' ERISA claim, whether or not they are considered in tandem with defendants' primary argument. Moreover, the remedy and waiver considerations already described by the Court in connection with the equal representation question apply with equal force to these matters.

In light of the inadequacies of defendants' position and the NLRB's findings that SASMI does not run afoul of the laws within its jurisdiction, the Court decides that plaintiffs' motion for summary judgment must be granted and defendants' motions denied.

IT IS SO ORDERED this 31st day of May, 1978.

/signed/ June L. Green

JUNE L. GREEN
U. S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Plaintifffs, | ) | Civil Action No. 79-1957 |
| v. | ) | |
| ANNING-JOHNSON COMPANY, et al., | ) | |
| Defendants. | ) | |

ORDER

For the reasons stated in the accompanying Opinion, plaintiffs' motion for summary judgment is granted.

IT IS SO ORDERED this 31st day of May, 1978.

/signed/ June L. Green

JUNE L. GREEN
U. S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Plaintifffs, | ) | Civil Action No. 79-1957 |
| v. | ) | |
| ANNING-JOHNSON COMPANY, et al., | ) | |
| Defendants. | ) | |

NOTICE OF APPEAL

Pursuant to Rule 3 of the Federal Rules of Appellate Procedure, notice is hereby given that Defendants Anning-Johnson Company, et al., hereby appeal from the opinion and order entered by the District Court on May 31, 1978, which granted Plaintiffs' Motion For Summary Judgment and denied Defendants' Motion For Summary Judgment.

/Signed/ Gerard C. Smetana

Gerard C. Smetana
2011 Eye Street, N.W.
Suite 800
Washington, D. C. 20006

June 28, 1978

APPENDIX E

IN THE UNTIED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Plaintiffs, | ) | Civil Action No. 76-1957 |
| v. | ) | |
| ANNING-JOHNSON COMPANY, et al., | ) | |
| Defendants. | ) | |

MOTION FOR ATTORNEYS' FEES

Plaintiffs respectfully move this Court for an award against defendants of attorneys' fees and expenses in the amount of $6,785.01.

On May 31, 1978, this Court entered summary judgment in favor of the plaintiffs. Having prevailed, plaintiffs now seek attorneys' fees and expenses pursuant to Section 502(g) of ERISA, 29 U.S.C. §1132(g), which authorizes the Court to award plaintiffs reasonable attorneys' fees and costs of the action. Moreover,

Article V, Section 4 of the National SASMI Agreement and Declaration of Trust, by which defendants agreed to be bound, provides that a defaulting employer may be required to pay all expenses of collection, including attorneys' fees.

This application for attorneys' fees reflects plaintiffs' legal services performed from November, 1976 through May, 1978. Accordingly, plaintiffs reserve ther ight to submit a supplemental motion for legal fees and expenses at the conclusion of appellate proceedings.

Respectfully submitted,

/s/ Harry Huge
Harry Huge
Joel I. Klein
David A. Martin
ROGOVIN, STERN & HUGE
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Dated: 8/3 , 1978

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | : | |
| Plaintiffs, | : | Civil Action No. 76-1957 |
| v. | : | |
| ANNING-JOHNSON COMPANY, et al., | : | |
| Defendants. | : | |

ORDER

The Court has entered summary judgment in this cause on May 31, 1978. Now upon consideration of thhe supporting Memorandum of Law and Affidavit of Harry Huge and supporting exhibits, it is by the Court this 17th day of August, 1978,

ORDERED that defendant shall pay plaintiffs' attorneys' fees and professional expenses in the amount of $6,785.01, this sum being fair and reasonable.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | : | |
| Plaintiffs, | : | Civil Action No. 76-1957 |
| v. | : | |
| ANNING-JOHNSON COMPANY, et al., | : | |
| Defendants. | : | |

ORDER

On August 17, 1978, this Court granted plaintiffs' then unopposed Motion for Attorneys' Fees dated August 3, 1978. The motion was duly served on defendants' attorneys on August 3, 1978. See plaintiffs' certificate of service.

Defendants filed opposition to plaintiffs' motion on August 18, 1978, out of time under Rule 1-9(d) of the Rules of the United States District Court for the District of Columbia. The Court treats this later filing as a motion for reconsideration of its order granting plaintiffs

attorneys' fees.

Upon consideration of the reasons advanced in defendants' "Response to Plaintiffs' Motion for Attorneys' Fees," the Court declines to overturn or amend its order of August 17, 1978. It is

ORDERED that defendants' motion for reconsideration is denied.

/s/ June L. Green
JUNE L. GREEN
U. S. District Judge

Dated; August 25, 1978

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | : | |
| Plaintiffs, | : | Civil Action No. 76-1957 |
| v. | : | |
| ANNING-JOHNSON COMPANY, et al., | : | |
| Defendants. | : | |

NOTICE OF APPEAL

Pursuant to Rule 3 of the Federal Rules of Appellate Procedure, notice is hereby given that Defendants' Anning-Johnson Company, et al., hereby appeal from the order entered on August 25, 1978 which denied Defendant's timely motion for reconsideration from an order of the District Court entered on August 17, 1978 which granted Plaintiff's motion for attorneys' fees and professional expenses.

/s/ Gerard C. Smetana
GERARD C. SMETANA
2011 Eye Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 659-8687

September 25, 1978

APPENDIX I

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Nos. 78-1761; 78-2071

---

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al.

Appellees,

v.

ANNING-JOHNSON COMPANY, et al.

Appellants.

---

ON APPEAL OF A FINAL ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

---

Appellants respectfully petition the Court for rehearing and suggest rehearing en banc of the decision of the panel of the Court issued on May 4, 1981, which holds:

1) That contributing employers may not assert Section 302(c)(5)(A) and (B) defenses to a collection suit for

defenses to a collection suit for contributions to a Taft-Hartley trust;

2) That the Court has no jurisdiction to hear defenses predicated upon provisions of the National Labor Relations Act; and

3) Which awards attorneys' fees for a collection suit to a Taft-Hartley trust adjudicated by the United States District Court for the Southern District of Alabama to be unlawful [1] .

---

[1] Mobile Mechanical Contractors Ass'n, Inc. v. Carlough, 456 F.Supp. 310 (1978) (no appeal from this aspect of Judge Hand's decision has been filed). The Appeal that is pending in the 5th Circuit Mobile Mechanical Contractors (Mobile), No. 79-2054, from Judge Hand's decision is limited to the issue of damages. (See Notice of Appeal in Mobile, Exhibit A attached) and, more importantly, MEMORANDUM IN OPPOSITION TO MOTION TO CONSOLIDATE Mobile with Central Florida Sheet Metal Contractors Association, Inc. v. NLRB, No. 79-2396, relied upon by Judge June Green below and previously filed as an exhibit in this Appeal in which counsel for the Sheet Metal Workers clarify the Notice of Appeal to show that SASMI is not part of the Appeal stating:

(footnote continued on next page)

The lawfulness of SASMI definitely is not an issue in the Mobile case, No. 79-2054, because Sheet Metal Workers' International Association, AFL-CIO, and Edward J. Carlough, President, appellants therein, are not challenging or citing as error the District Court's determination that SASMI did not comply with the requirements of Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 USC, Section 186(c).

---

Explanation of above footnote not a part of pleading filed with D. C. Circuit

---

Reference in the above footnote to the legality of SASMI not having been appealed to the Fifth Circuit in No. 79-2054 is taken from the Union's Memorandum in Opposition to Motion to Consolidate which was attached to and filed with the D.C. Circuit herein on or about October 8, 1979, as part of defendant-appellants (petitioners herein) reply to opposition to defer briefing schedule pending a decision of the Fifth Circuit on legality of SASMI.

The Union's memorandum in opposition to motion to consolidate was in response to a motion filed by the Central Florida Sheet Metal Contractors Association in the Fifth Circuit, No. 79-2936, of which petitioners herein are members. No. 79-2396, awaiting decision in the Fifth Circuit, was consolidated for purposes of argument with appeal from Mobile Mechanical Contractors Association v. Carlough, 456 F.Supp. 310 (S.D. ALA 1978) which held SASMI to be illegal and was not appealed from on that issue in No. 79-2054 awaiting decision in the Fifth Circuit.

1. It has always been the law, until the instant panel decision, that federal courts do not enforce contractual obligations where illegality is raised as a defense. "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." McMullen v. Hoffman, 174, U.S. 639, 654 (1899). A defense of illegality is available and will bar a court from enforcing an illegal agreement "where the judgment of the Court would itself be enforcing the precise conduct made unlawful" by federal law. Kelly v. Kosuga, 358 U.S. 516, 520 (1959). Here, enforcement of the funds' collection suit requires "the precise conduct" made unlawful by express federal labor law. Section 302(a) precludes employer payments to trust funds not in "strict compliance" with Section 302(c)(5)(A) and (B).

Here, the illegality of the Trust Fund upon which the collection suit

is premised is not, as in Mullins[2], a mere allegation as the panel repeatedly stated (sl. op. pp. 2, 14, 19 n. 16) The legality of SASMI's "equal representation" and "special incentives" provisions have been declared unlawful by Judge Hand. 456 F.Supp. at 327. In those circumstances, even more so than in Mullins, the panel enforces a contribution application which plainly violates the law specifically designed to prohibit such [contributions]", Mullins, supra, n. 2, dissenting opinion of Judge Wilkey, sl. op. p. 1. The panel in this case erroneously considered the contractors' defenses to be a mere allegation. The panel ignored the unappealed precedential effect of Judge Hand's decision in holding that an allegation of Section 302(c)(5) infirmites did not state a defense to a collection suit. In so doing, the panel nullified express federal policy embodied in Section 302(c)(5)(A) and (B) and indeed ordered

---

[2] Mullins v. Kaiser Steel Corp., No. 79-1463 (D. Cir. September 17, 1980), petition for cert. granted, 49 U.S.L.W. 3824, (May 4, 1981)(No. 80-1345).

contractors to make payments to a trust fund determined by a member of the federal judiciary to be unlawful. In the Mobile Mechanical Contractors case, Judge Hand recognized the illegality of SASMI vel non and did not require the contractors there to continue to make benefit contributions.

The panel's concern here for the rights of SASMI beneficiaries (sl. op. pp. 19-20) is thus entirely misplaced. Neither in the Taft Hartley Act nor in ERISA did Congress declare these interests to be paramount to the legality of the underlying Taft Hartley pension plan, which creates the contractors' payment obligation. Rather, Congress required, as a prerequisite to contribution "strict compliance with Section 302(c)(5)(A) and (B)." The panel's unwarranted refusal to determine SASMI's legality conflicts strikingly with its conclusion that these Section 302 requirements are indeed relevant to a pension collection suit initiated under ERISA. Sl. op. pp. 10-12.[3]

---

[3] The panel's decision subjects the contractors to potential criminal sanction by requiring them to make payments to SASMI, the same and identical plan declared unlawful by Judge Hand. Section 302(d).

The panel has written the defense of 302(c)(5)(A) and (B) illegality out of federal labor law. By definition, a party can raise a defense of illegality only by waiting until a collection suit is brought against it. The panel's broad rationale eliminates a defense which was recognized as properly raised in pre-ERISA collection suits under Section 301 of the Act. Thomas v. Reading Anthracite Co., 264 F. Supp. 339 (N.D. Pa. 1966). As the panel recognized (sl. op. pp. 10-11), Congress in enacting ERISA in 1974 did not intend to change the existing federal law under Section 302.

If this petition is denied, the panel's decision encourages disregard of the requirements of Section 302(c)(5)(A) and (B). Unions going through trust funds can now be certain that collection suits can be initiated without fear that compliance with these requirements need first be made. The panel's decision thus permits unlawful conduct and nullifies the public interests legislated by Congress in Section 302 nullifying this very conduct. Moreover, the panel's decision encourages litigation by

the panel's decision encourages litigation by requiring all parties to questionable Taft-Hartley trusts to promptly initiate legal proceedings even if, as here, any efforts are made to enforce payment obligations to insure that the likelihood of the pension plan can be determined. This proliferation of unnecessary law suits can be simply avoided by allowing contractors to raise the same defense to collection they could raise prior to the enactment of ERISA in 1974. Because the panel decision ignored a federal court decision declaring identical provisions of SASMI unlawful, and because the panel's "solution" necessarily multiplies unnecessary litigation, this petition should be granted [4] .

2. The panel declined "to exercise jurisdiction" over the contractors' claim that SASMI's trustee's selection provision violated Section 8(b)(1)(b) of the National

[4] The panel's solution to the contractors' dilemma remits the contractors to a Section 302(e) suit. This avenue is not "the well established procedure" perceived by the panel, sl. op. p. 14.

Labor Relations Act, sl. op. p. 9. In so doing, the panel ignored the now settled principle that federal courts have jurisdiction to decide collateral federal labor law questions. Connell Construction Co. v. Plumbers Local 100, 421 U. S. 616 (1975). It has repeatedly been held that a federal court may decide all relevant legal questions to enforce an obligation arising out of the collective bargaining agreement. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 16 (1974). Thus, for example, a federal court has jurisdiction to determine whether a contract violates Section 8(e) of the National Labor Relations Act and is thus unenforceable even though the party asserting its illegality has not filed a charge with the National Labor Relations Board [5], or to enforce an arbitration award where the defense asserts that the contract clause violates Sections 8(a)(3) and 8(b)(2) of the Act.[6] Accordingly, there is ample Article III

[5] United Optical Union, Local 408 v. Sterling Optical Co., 500 F.2d 220 (2d Cir. 1974).

[6] Perma-Line Corp. v. Sign Pictorial and Display, Local 230, 639 F.2d 890 (2d Cir. 1981); accord: IAM Local 1896 v. Brake and Electric Sales Corp., 279 F.2d 590 (1st Cir. 1960).

power for the Court of Appeals and the District Court to have ruled upon the contractors' contentions. The question of whether SASMI is legal as a matter of federal labor policy is just as much a legal prerequisite to a collection suit as conformity with Section 302(c)(5).

3. In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court limited attorneys' fees awards to prevailing litigants entitled by express federal statute. While SASMI asserts jurisdiction under Section 502 of ERISA, 29 U.S.C. 1132, this is not an ERISA suit. ERISA is not intended to regulate collective bargaining agreements, or "to control every aspect of the employer-employee relationship or every promise made to employees." Taggert Corp. v. Efros, 475 F. Supp. 124, 125 (S.D. Tex. 1979)[7].

[7] Section 2 of ERISA describes the statutes' purpose as follows:

> [To] protect ... the interests of participants in ample benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries all financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries and employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 U.S.C. Section 1001.

Its purpose is to protect beneficiaries from incompetent or dishonest fiduciaries and "to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards." Murphy v. Inexco Oil Co., 611 F.2d 570, 574 (5th Cir. 1980).

The instant collection suit is in actuality predicated upon Section 301 to enforce an obligation contained in a collective bargaining agreement between the contractors and the Sheet Metal Workers Union. There is no separate agreement between the funds and the contrctors requiring the payment of pension and welfare benefits. In this circumstance, it has long been recognized:

> The rights of the trustees [to collection] are entirely derivative. Their right to recover contributions from [employers] is dependent upon the real agreement between [employers] and the Union. Lewis v. Lowry, 295 F.2d 197, 199 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962).

As Judge Wilkey stated in Mullins v. Kaiser Steel Corp., supra, n. 2 sl. op. p. 32, "this suit was not brought to challenge a

collective bargaining agreement ... the trustees have confused an effort to comply with ERISA with an effort to enforce it." Here, as in Mullins, supra, there is no allegation that the contractors violated ERISA.

For the reasons stated by Judge Wiley in Mullins, the panel erred in upholding the District Court's attorneys' fees award in this case.

## CONCLUSION

For these reasons, the Contractors respectfully pray that this Petition for Rehearing en banc be granted, and tha, upon such rehearing, the Court apply the binding precedent of Judge Hand's decision holding SASMI in violation of Section 302(c)(A) and (b), and dismissing the instant collection suit until such time as SASMI conforms to the strict requirements of Section 302(c)(5)(A) and (B).

Respectfully submitted,

Gerard C. Smetana
500 Marquette Bldg.
140 South Dearborn
Chicago, IL 60603
(312) 346-4515

Dated at Chicago, Illinois
May 18, 1981

ATTACHMENT TO APPENDIX I
FILED WITH U. S. COURT OF APPEALS
For the District of Columbia Circuit
as Part of Petition for Rehearing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.<br><br>Plaintiff,<br><br>v.<br><br>EDWARD J. CARLOUGH, individually, and as the representative of all members of the Sheet Metal Workers' International Association, et al.,<br><br>Defendants. | ) | Civil Action No. 74-409-H<br><br>NOTICE OF APPEAL |

Notice is hereby given that Sheet Metal Workers' International Association, AFL-CIO, and Edward J. Carlough, individually and as General President of Sheet Metal Workers' International Association, AFL-CIO, defendants above-named, hereby appeal to the United States Court of Appeals for

the Fifth Circuit from that part of the final judgment entered in this action that denied the motion for summary judgment as to liability in favor of these defendants and against the plaintiff and entered summary judgment as to liability in favor of the plaintiff and against these defendants, said decision and order, dated August 17, 1978, having been merged and incorporated into and comprising a part of the said final judgment entered herein on February 23, 1979.

April 12th, 1979.

HESS, ATCHISON & STOUT
Post Office Box 1706
Mobile, Alabama 36601
By _____

MULHOLLAND, HICKEY, LYMAN,
McCORMICK, FISHER & HICKEY
741 National Bank Building
Toledo, Ohio 43604
By_____

Attorneys for Defendants.

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Appellees, | ) | Nos. 78-1761 |
| v. | ) | & 78-2071 |
| COMMERCIAL ROOFING & SHEET METAL, et al., | ) | |
| Appellants. | ) | |

MOTION FOR ATTORNEYS' FEES

Appellees respectfully move this Court, pursuant to 29 US.C. §1132(g) and the National Stabilization Agreement of the Sheet Metal Industry Agreement and Declaration of Trust, for an award of attorneys' fees incurred in the appeal of

this case in the amount of EIGHTEEN THOUSAND THIRTY-SEVEN DOLLARS AND FIFTY CENTS ($18,037.50).

Respectfully submitted,

/s/ David R. Boyd
Harry Huge
David R. Boyd
Eugene J. Comey
Krista M. Fogleman
ROGOVIN, STERN, HUGE & LENZNER
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Attorneys for Appellees

Date: May 22, 1981

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1761 September Term, 1980

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., Appellees, | ) | Civil Action No. 76-1957 |
| v. | ) | |
| COMMERCIAL ROOFING & SHEET METAL, et al., Appellants. | ) | |

And Consolidated Case No. 78-2071

BEFORE: Tamm and Mikva, Circuit Judges and Philip Nichols, Jr.*, Judge, United States Court of Claims

O R D E R

On consideration of appellants petition for rehearing, filed May 18, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

Filed June 17, 1981
George A. Fisher
Clerk

* Sitting by designation pursuant to Title 28 U.S.C. §293(a).

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1761 September Term, 1980

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., Appellees, | ) | Civil Action No. 76-1957 |
| | ) | Argued 12-12-80 |
| v. | ) | |
| COMMERCIAL ROOFING & SHEET METAL, et al., Appellants. | ) | |

- - - - - - - - - - - - - - - -

And Consolidated Case No. 78-2071

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and Philip Nichols, Jr.*, Judge, United STates Court of Claims

ORDER

Appellants' suggestion for rehearing en banc has been circulated to the full Court and no judge of the Court of member of the panel has requested the taking of a vote

thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

By: /s/ Robert F. Bonner
Chief Deputy Clerk

Filed June 17, 1981.
George A. Fisher
Clerk

* Sitting by designation pursuant to Title 28 U.S.C. §293(a)

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

| | | |
|---|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al., | ) | |
| Appellees, | ) | Nos. 78-1761 |
| | ) | & |
| v. | ) | 78-2071 |
| COMMERCIAL ROOFING & SHEET METAL, et al., | ) | |
| Appellants. | ) | |

MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

This Memorandum is submitted in support of the motion of the prevailing appellees for an award of attorneys' fees of $18,037.50 in connection with this appeal.

In August 1978, appellees, as the prevailing plaintiffs below, filed their motion for fees incurred in pursuing their claim before the District Court. Like the instant motion, the motion in the District Court sought reimbursement for attorneys' fees paid to counsel for the National Stabilization Agreement of the Sheet Metal

Industry "SASMI") in pursuing this matter. [1] Appellees' request in the District Court was granted in the full amount sought. National Stabilization Agreement of the Sheet Metal Industry v. Anning-Johnson, No. 76-1957 (D.D.C. May 31, 1978).

On May 4, 1981, this Court affirmed the District Court's decision, including its award of fees. National Stabilization Agreement of the Sheet Metal Industry v. Commercial Roofing & Sheet Metal, Nos. 78-1761 & 78-2071 (D.C. Cir. May 4, 1981). With respect to the fee award, the Court stated:

> We reject appellants' contention that the district court's award of attorneys' fees to appellees was improper. Under section 502(g) of ERISA, 29 U.S.C. §1132(g) (1976), a court may award, in its discretion, a reasonable attorneys' fee and costs in any action brought under the Act by a fiduciary, beneficiary or participant. The SASMI trustees are fiduciaries obligated by ERISA to discharge their

---

[1] The motion stated in part:

This application for attorneys' fees reflects plaintiffs' legal services performed from November, 1976 through May, 1978. Accordingly, plaintiffs reserve the right to submit a supplemental motion for legal fees and expenses at the conclusion of the appellate proceedings.

> duties for the purpose of providing benefits to participants and their beneficiaries. See 29 U.S.C. §1104(a)(1)(A)(1976). Pursuant to this obligation these trustees instituted an action to collect overdue employer contributions. The district court exercised its discretion toa ward the fees and costs attendant to that action, and we can find no abuse of that discretion. Id., slip op. at 21 (Citations omitted).

The same considerations that prompted the Districts Court's fee award and this Court's affirmance call for the award of attorneys' fees for the appeal. As this Court has recognized, the trustees of the Fund were obligated by their fiduciary responsibilities to institute litigation in the District Court to collect overdue employer contributions owed by the appellant companies. Those same fiduciary obligations required that the trustees respond vigorously to the appellants' attack on the District Court's decision, especially since some of the issues sought to be raised on appeal were matters that go to the very heart of the National Stabilization Agreement of the Sheet Metal Industry which the trustees administer.

The instant fee award seeks compensation for attorneys' fees paid by the Fund to their Counsel for their defense of this appeal, which are authorized by Section 502(g) of the Employees Retirement Income

Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(g) and by the SASMI Trust Agreement to which appellants are a party. As the accompanying affidavit of David R. Boyd indicates, the fees sought in this motion are reasonable and the award of fees for this appeal is necessary to assure that participants and beneficiaries of SASMI not be penalized for the appellant companies' refusal to honor their contribution obligations and for their litigation tactics.

I. ERISA and the SASMI Trust Agreement Authorize The Award Of Reasonable Attorneys' Fees For SASMI Trustee's Successful Defense Of This Appeal.

Section 502(g)(2) of ERISA Provides that the Court "shall award the plan ... reasonable attorneys' fees and costs of the action, to be paid by the defendant" in any action brought by a fiduciary for or on behalf of a plan to enforce Section 515 where a judgment in favor of the plan is awarded. 29 U.S.C. §1132(g)(2).2/ As

---

2/ At the time collection suit was filed in the District Court, Section 502(g) authorized the award of fees and costs at the discretion of the Court. Generally speaking, reasonable fees were awarded to prevailing plans as a matter of course even under that statute. See, e.g., Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1356 (8th Cir. 1980); Central States Southeast and Southwest Areas Pension Fund v. Hitchigns Trucking, Inc., 492 F.Supp. 906, 909 (E.D. Mich. 1980). The 1980 amendments to ERISA, which were effective

(footnote from previous page continued)

on September 26, 1980, see 29 U.S.C. §1461(e), make the award of fees mandatory in successful collection suits brought by ERISA plans.

As a general rule, federal courts should apply the law existing at the time the case is decided. Fusari v. Steinberg, 419 U.S. 379 (1975); Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972). Thus, the 1980 amendments govern in this instance.

the Court has recognized, the SASMI trustees instituted this collection case as a part of their fiduciary obligations to the Fund, Commercial Roofing, supra, slip op. at 21. Moreover, a judgment in favor of the Fund has been entered and affirmed on appeal.

The United States Court of Appeals recognized in Landro v. Glendenning Motorways, Inc., 625 F.2d 1344, 1356 (8th Cir. 1980), that ERISA Section 402(g) "like the rest of ERISA, is remedial legislation that should be construed liberally in favor of those persons it was meant to benefit, namely, participants in and beneficiaries under covered pension and welfare plans. . . ." The obvious purpose of the attorneys' fee provision of ERISA Section 502(g) is to assure that the plan not be diluted by the costs of enforcing employers' contribution obligations, and thus that the participants and beneficiaries of the plans not suffer from employer defaults. As the Court stated here in this case, "the more significant congressional interest lies in the protection of trust beneficiaries by securing for them the benefits to which they are entitled under a collective bar-

gaining agreement." Commercial Roofing, supra, slip op. at 22.

In this case, the fundamental congressional policies will be promoted by the award of reasonable attorneys' fees to the trustees for prevailing in an appeal to enforce employers' contribution obligations. Section 502(g)(2), (2) which makes the award of fees mandatory,3/ suggests no distinction between district court and

3/ The trustees also are entitled to collect attorneys fees under the SASMI Trust Agreement to which the appellants are bound. Article V, Section 4 of the National SASMI Agreement and Declaration of Trust provides:

> Section 4. DEFAULT IN PAYMENT. The Trustees may take any action necessary to enforce payment of the contributions due hereunder, or, if applicable, under Local Fund Agreement, including but not limited to, proceedings at law and equity. Nonpayment of an Employer of any Contributions when due shall not relieve any other Employer of his obligation to make payments. In addition to any other remedies or damages, including punitive damages where appropriate to which the parties may be entitled, an Employer in default of ten (10) days may be required at the discretion of the Trustees to pay

(footnote from previous page continued)

interest at the rate specified for an Employer under his Collective Bargaining Agreement with respect to delinquent payments into other fringe benefit funds or, at the option of the Trustees, at a higher rate up to the highest rate of interest permissible under the law of the state in which the delinquent Employer is located, from the date when the payment was due to the date when payment is made together with all expenses of collection incurred by the Trustees, including but not limited to counsel fees.

appellate litigation in this context, and the purposes of ERISA are served only if courts award fees for all litigation taken by ERISA plans to enforce employer contribution obligations.4/

II. The Attorneys' Fees Incurred In This Appeal Are Reasonable And Were Necessary To Respond To The Many Contentions Appellants Raised.

As noted previously, the instant attorneys' fee award is based on the same principles applied by the District Court and affirmed by this Court. The SASMI trustees seek reimbursement for fees actually incurred at the rates they actually pay their counsel. All of the attorneys' fees sought in this application have been or will be billed to SASMI and paid by SASMI to their counsel. See Affidavit of David R. Boyd, set forth in Appendix A, hereto.

4/ Courts of appeal have recognized in the context of other statutory fee awards that the prevailing plaintiff is entitled to an award of fees for prevailing on the appeal. See, e.g., Hampton v. Hanrahan, 600 F.2d 600, 643 (7th Cir. 1979), modified on other grounds, 446 U.S. 754 (1980).

These fees are entirely reasonable and are in full accord with the principles articulated in this Court's recent decision in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)(en banc). The services provided by counsel likewise were reasonable, and were dictated by the appellants' litigation strategy.

Appellants first attempted to transfer this appeal to the United States Court of Appeals for the Fifth Circuit or, in the alternative, to delay briefing and argument until after allegedly related cases were decided by that Court. Appellees were required to respond to that motion, which this Court substantially denied.

Undeterred by this Court's refusal to transfer the case to the Fifth Circuit, appellants then pressed the Court to resolve an important an far-reaching issue then pending that other Court -- whether trustees of funds such as SASMI are bargaining representatives and whether a district court has jurisdiction to restrain violations of Section 302 of the Labor Man-

agement Relations Act.5/ Prudence dictated that the trustees both brief the impropriety of raising the issue here and respond to the merits of the issue, which the Court properly declined to decide.6/

Appellants additionally raised and briefed a number of other issues not properly presented on appeal, prompting this court to make an "imperative" preliminary statement of what was and was

5/ This issue is presently before the Supreme Court on writ of certiorari from the decision of the United States Court of Appeals for the Third Circuit in Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980), cert. granted, 101 S.Ct. 917 (1981).

6/ As the Court stated:

> [The NLRB's decision on this issue], as we noted earlier, was not appealed to this court. Since it was not then offered for our consideration, we will not now presume, in this collateral manner, to exercise jurisidiction over it. Instead, we leave the issue's determination to the court before which it has been properly presented.

Commercial Roofing, supra, slip op. at 9; see also id. at 4.

not properly at issue in the appeal. Id. at 9-10; 14. In each case, the trustees were required to address both the propriety of appellants' attempt to raise the issues in view of the procedural posture of the case and the merits of the issues themselves.

The same policies of Section 502(g)(2) of the Employee Retirement Income Security Act of 1974, 129 U.S.C. §1132(g)(2) that supported this Court's affirmance of fees for the District Court litigation support an award for the appellate litigation as well. The appellate litigation was a necessary part of the trustees' pursuit of their fiduciary obligation to enforce the delinquent employers' contribution obligations, the nature and scope of which was largely dictated by the appellants' own appellate litigation tactics. The fees sought in this award are, as the accompanying affidavit of David R. Boyd indicates, based on actual services to SASMI and on the rates that SASMI actually pays its counsel for such services. Appellees respectfully submit that they

should be reimbursed in full for these activities.

## III. Conclusion

Appellees' respectfully submit that they should be awarded fees in the full amount sought in this motion.

Respectfully submitted,

/s/ David R. Boyd
Harry Huge
David R. Boyd
Eugene J. Comey
Krista M. Fogleman
REGOVIN, STERN, HUGE & LENZNER
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Attorneys for Appellees

Date: May 22, 1981

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 78-1761; 78-2071

---

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al.

Appellees,

v.

ANNING-JOHNSON COMPANY, et al.,

Appellants.

---

MEMORANDUM IN OPPOSITION TO MOTION FOR ATTORNEYS' FEES

On June 1, 1981[1], the under-

---

1 The Motion and Memorandum were mailed prior to the Memorial Day weekend. They were addressed to 33 North Dearborn Street, and I have moved my offices two times since that time and, accordingly, the forwarding stickers by the post office coupled with the long weekend occasioned the delay in receipt. Counsel for Appellees undoubtedly mailed to the old address through inadvertence as the Petition for Rehearing which was filed on May 18, 1981, bore the current address of counsel.

signed by regular mail was served with a copy of the Motion for Attorneys' Fees dated May 22, 1981, and Memorandum in Support of said Motion. Counsel for Appellants in the above action responds as follows.

1. On May 18, 1981, a timely Petition for Rehearing and Suggestion For Rehearing En Banc was filed with this Court, in the above captioned case, therefore, the Motion for Attorneys' Fees is premature [2] .

2. Should the Petition for Rehearing not be granted, it is submitted that the Court should delay any decision on the question of attorneys' fees in this matter until the U. S. Supreme Court

[2] In addition, Issue No. 3 in the Rehearing Petition raises recent authorities concerning the appropriateness of the Court's affirmance of the discretionary award of attorneys' fees by the district court. As a predicate for the award of appellate attorneys' fees is the Court's affirmance of the district court decision, the Motion is further premature for this reason. The arguments raised in the Rehearing Petition concerning attorneys' fees and the intervening Mullins v. Kaiser Steel decision are separately raised in opposition to the Motion for appellate attorneys' fees in paragraph 2 of this Memorandum in Opposition.

decides Mullins v. Kaiser Steel Corp., No. 79-1463 (D. C. Cir. September 17, 1980), petition for cert. granted, 49 U.S. L.W. 3824, (May 4, 1981) (No. 80-1345). As Judge Wilkey stated in Mullins v. Kaiser Steel (n. 2, sl. op. p. 32) ("this suit was not brought to challenge a violation of the pension plan but was brought to enforce a collective bargaining agreement ... the trustees have confused an effort to comply with ERISA with an effort to enforce it.") Here, as in Mullins, this is not a suit to enforce a plan. It is in fact more akin to a suit under Section 301 to enforce a collective bargaining agreement rather than a suit for collection under Section 504.

In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court limited attorneys' fees awards to prevailing litigants entitled by express federal statute. While SASMI asserts jurisdiction under Section 502 of ERISA, 29 U.S.C. 1132, this is not an ERISA suit. ERISA is not intended to regulate collective bargaining agreements, or "to control every aspect of the employer-employee relationship or every promise made to employees." Taggert Corp. v. Efros, 475

F. Supp. 124, 125 (S.D. Tex. 1979)[3]. Its purpose is to protect beneficiaries from incompetent or dishonest fiduciaries and "to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards." Murphy v. Inexco Oil Co., 611 F.2d 570, 574 (5th Cir. 1980).

The instant collection suit is in actuality predicated upon Section 301 to enforce an obligation contained in a collective bargaining agreement between the contractors and the Sheet Metal Workers Union. There is no separate agreement between the funds and the contractors requiring the payment of pension and welfare benefits. In this circumstance, it has long been recognized:

[3] Section 2 of ERISA describes the statute's purpose as follows:

> [To] protect ... the interests of participants in ample benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries all financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries and employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 U.S.C. Section 1001.

> The rights of the trustees [to collection] are entirely derivative. Their right to recover contributions from [employers] is dependent upon the real agreement between [employers] and the Union. Lewis v. Lowry, 295 F.2d 197, 199 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962).

In view of the dissent by Judge Wilkey in Mullins on the appropriateness of attorneys' fees and, in view of the Court's reliance upon Mullins for its affirmance of attorneys' fees below, and, in view of the grant of certiorari of Mullins which includes the question of attorneys' fees, and for the reasons stated by Judge Wilkey, which are enumerated above, the award of attorneys' fees sought by the Appellees should be denied.

3. Should the Court find Mullins v. Kaiser Steel Corp., supra, not controlling, the Motion for Attorneys' Fees should nevertheless be disallowed because at the time the instant action was commenced and at the time the instant appeal was commenced, awards for attorneys' fees were discretionary rather than mandatory. (See Fn. 2, p. 4, of Trust Fund's Memorandum in Support of Motion for Attorneys' Fees.)

The only authority that Appellees cite in support of the silence in the statute and its legislative history (§ 502(g)(2)) for the applicability of attorneys' fees to appellate litigation is the award of attorneys' fees in an appellate context in Hampton v. Hanrahan, 600 F.2d 600, 643 (7th Cir. 1979), cited at page 6, footnote 4 of Appellees' Memorandum. The Hampton v. Hanrahan case and cases cited therein on the question of appellate attorneys fees are very instructive.

In Hampton v. Hanrahan, like in the instant case, the statute under which appellate attorneys' fees were sought was not in existence at the time the litigation or the appeal commenced. The award of appellate attorneys' fees in the Hampton case was made under the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. 1988, under which Act courts were afforded discretion to award attorneys' fees in certain civil rights litigation: "Unless special circumstances render such recovery unjust, citing Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977) at 600 F.2d 643.

Wharton v. Knefel cited in the Hampton case as authority for the award of attorneys' fees predicated upon legislation that was enacted subsequent to the litigation or the commencement of the appeal holds that attorneys' fees under the Civil Rights Act (the only basis for attorneys' fees in the Hampton v. Hanrahan case) were appropriate only because "Congress clearly intended the (Civil Rights Attorneys' Fees) Act should apply retroactively in cases pending on appeal on the 1976 (Civil Rights) Act's effective date." 562 F.2d 550 at 557. There is no similar legislative history in the 1980 ERISA amendments specifically requiring retroactive application of appellate attorneys' fees. Not only, therefore, is Hampton v. Hanrahan, and the line of cases relied upon therein, not authority for the mandatory award of attorneys' fees but the cases cited therein are in fact authority for the proposition that, absent clear legislative history or legislative language, awards of attorneys' fees must follow the general American rule.

Under the general American rule and consistent with the U. S. Supreme Court's decision in Alyeska, supra, awards of attorneys' fees are not appropriate unless mandated by statute. As the Whatron v. Knefel case, supra, suggests, the authority for attorneys' fees under the Civil Rights Act was in response to the Supreme Court's Alyeska decision and no doubt the 1980 ERISA amendment must similarly be construed as being in response to that Supreme Court decision. Under the teaching of Wharton v. Knefel, the absence of explicit legislative history or language in the statute providing either for retroactive application of mandatory attorneys' fees or for an award of appellate attorneys' fees should nto only be dispositive of the question of mandatory appellate attorneys' fees but should also be convincing argument for lack of authority for the availablity of even discretion to award appellate attorneys' fees.

4. To the extent that Hampton v. Hanrahan, supra, is construed to be authority for the award of discretionary appellate attorneys' fees which, in fact, was

the basis upon which the attorneys' fees were awarded, the Court must also examine the special equities that favored the award of discretionary appellate attorneys' fees in Hampton v. Hanrahan.

First, Hampton was the beneficiary of the language in Wharton v. Knefel of a specific statutory provision mandating retroactivity -- clearly not present in this case.

Second -- on the question of the Court's exercise of its discretion assuming jurisdiction, the Hampton case essentially involved an allegation of runaway police brutality and interference with citizens' civil liberties. Hampton was unsuccessful in the district court and, accordingly was not awarded attorneys fees in the district court. In a lengthy opinion, the Appellate Court reversed the district court and was severely critical of the Government in its interference with the rights of the plaintiffs. While the Court did not address the equities, it did suggest that further attorneys' fees could be awarded and Hampton prevailed on the remand in the

district court. It thus appears that a part of the reason for the court having exercised its discretion in favor of awarding the attorneys' fees was the economic circumstance of the poor black plaintiffs who had been wronged by the Government and had not yet obtained, and were not in a position to obtain, at that point in time discretionary district court attorneys' fees.

In contradistinction to the overwhelming equities favoring the award of attorneys' fees to the successful appellee in Hampton v. Hanrahan, the equities in the instant case are exactly reverse. Here, the successful Appellee is pursuing the appellate attorneys' fees question not only for the attorneys' fees themselves but also for establishing a principle for the first time that the SASMI Fund and all the other pension funds with their substantial economic power should be able to collect attorneys' fees in these circumstances. It is submitted that not only are the Funds involved here financially solvent but the contractors here who are the Appellants

-re small sheet metal contractors, all of whom have experienced and continue to experience the difficult economic depression faced by the construction industry. Thus, on the question of economic need, the positions here are reversed from that in Hampton v. Hanrahan.

More significantly, however, are the fundamental equities of the difference between an award of discretionary attorneys' fees in a civil rights case or a traditional ERISA case, rather than one depending on the legality of the Trust itself which involves areas of known responsibility. Where the underlying issue involved in the litigation relates to the violation of a statutory provision, such as whether or not an employer has discriminated under the Civil Rights Act, the equities in favor of appellate attorneys' fees are not as great because the parties are presumed to know the law. The underlying facts in the instant case involve a novel trust agreement that had never been tested before and, in fact, was foisted upon the Appellees against their will as a result of

a protracted labor strike. In an effort to determine whether there was in fact any legal obligation to make the payments, the monies were paid in escrow and the Appellees, all members of the Central Florida Sheet Metal Contractors Association, filed charges with the NLRB against the Union conduct, which charges embodied the theory that the underlying trust document did not comply with Section 302(c)(5). Subsequently, the Trust Funds filed the instant litigation. Evidence that the Appellees' position has not been an unreasonable one is the fact that:

(a) the NLRB General Counsel found probable cause and issued a complaint;

(b) the tryer of the facts, the NLRB Administrative Law Judge, agreed with the position of the Appellees predicated upon an interim decision by District Court Judge Hand in the Mobile Mechanical Contractors case, finding similar picketing to be unlawful and preliminarily finding the agreement to violate 302(c)(5);

(c) subsequently, the NLRB

did not in fact reverse the Administrative Law Judge, but rather found that it had no jurisdiciton to determine the legality of the Trust;

(d) predicated upon the NLRB's refusal to exercise jursidiction, the court below likewise refused to exercise jurisdiction on the merits of the arguments but found that the monies were owing and awarded attorneys' fees thereupon;

(e) in the meantime, Judge Hand upon remand from the Fifth Circuit finally determined the Trust to be illegal and the Appellants have contended in the Rehearing Petition that that should be the rule of the case; and

(f) Even the decision of this Court recognized that the Appellants can go back to the District Court under another section of the statute and litigate the merits.

In view of the substantial numbers of decisions as shown above agreeing that the underlying trust document here may in fact be invalid, surely the questions were new and novel and these should be the kinds of "special circumstances that would render an award of attorneys' fees unjust" (see Wharton v. Knefel, supra, and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400), which case seems to set forth the judicial standards for determining the rare circumstances in which a court may exercise its discretion to award attorneys' fees. It would certainly appear that the novelty of the issues and the continuing viability of ultimate success by the Appellees should preclude the Court from exercising its discretion to award appellate attorneys' fees.

It is, of course, the principal position of the Appellees that, unless the statute spells out the bases of discretionary attorneys' fees (and I submit we are here under the old statute rather than the 1980 amendments), appellate attorneys' fees as a matter of discretion should only be

awarded even where permissible where the appeal bounds on the frivolous absent clear and convincing legislative or statutory language specifically including appellate attorneys' fees [4] .

For all the foregoing reasons, it is respectfully requested that the Motion for Attorneys' Fees in connection with this Appeal be denied or stayed pending Supreme Court decision.

Respectfully submitted,

Gerard C. Smetana
Counsel for Appellants

Gerard C. Smetana, Esq.
KOVAR & SMETANA
500 Marquette Building
140 South Dearborn Street
Chicago, Illinois 60603
(312) 346-4515

Dated at Chicago, Illinois
June 8, 1981

[4] Contrary to the reference in passing contained in Fn. 3 at page 5 of the Memorandum in Support, Article V, Section 4 of

(footnote continued from previous page)

the SASMI Trust dealing with default payments should not be construed to mandate a finding of attorneys' fees in this case. The trust agreement here came into being under duress as a result of a strike and the payments in fact were paid in Escrow because of a legitimate question concerning the legality of the trust. The thrust of that provision is designed to obtain attorneys' fees for defaults in payment. It does not contemplate attorneys' fees incurred as a result of a contest concerning the legality of the trust document. In this case, the employers were not technically in default because the money was paid to the Funds in Escrow. Also, as the court below did not decide the case based upon an interpretation of the trust document but rather under the court's discretion, it is inappropriate for an Appellate Court to act as a trial court and interpret for the first time a factual question of interpretation. Evidence could have been presented concerning the meaning of the default in payment section and whether or not it was intended to cover appellate attorneys' fees. In view of the silence of Secton 4 of the trust document on the appropriateness of counsel fees in an appellate proceeding, this Court should not on its own award attorneys' fees based thereupon.

APPENDIX O

UNITED STATES DISTRICT COURT OF APPEALS
For The District Of Columbia Circuit

NO. 78-1761 September Term, 1980
Civil Action No.76-1957

National Stabilization Agreement of The Sheet Metal Industry Trust Fund, et al.

v.

Commercial Roofing & Sheet Metal, et al.,

Appellants.

FILED
July 17, 1981
George A. Fisher
Clerk

And Consolidated Case No. 78-2071

BEFORE: Tamm and Mikva, Circuit Judges; and Nichols*, Judge, United States Court of Claims

O R D E R

Upon consideration of appellees' (National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al.) motion for attorneys' fees, and of appellants' opposition thereto, it is

ORDERED, by the Court, that attorneys' fees in the total amount of $18,037.50 are awarded in favor of appellees (National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al.) and taxed against appel-

lants (Commercial Roofing & Sheet Metal, et al), jointly and severally.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER, Clerk

By: /S/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

APPENDIX P

UNITED STATES DISTRICT COURT OF APPEALS
For The District Of Columbia Circuit

NO. 78-1761 September Term, 1980
Civil Action No. 76-1957

National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al.

v.

Commercial Roofing & Sheet Metal, et al.,

Appellants.

FILED
July 29, 1981
GEORGE A. FISHER
CLERK

And Consolidated Case No. 78-2071

BEFORE: Tamm and Mikva, Circuit Judges; and Nichols*, Judge, United States Court of Claims

O R D E R

Upon consideration of appellants' motion to correct name on decision and on bill of costs, and of appellees' memorandum in response thereto, it is

ORDERED, by the Court, that appellants' aforesaid motion is granted and the Clerk is directed to amend the caption of this Court's previously issued decision, and appellants' bill of costs, to reflect that

appellants in this case are limited to D. W. Browning Contracting Company, Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc., and Von Aire, Inc.

Per Curiam
FOR THE COURT:

/S/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §293(c)

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 78-1761; 78-2071

---

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, et al.
Appellees,

v.

ANNING-JOHNSON COMPANY, et al.,
Appellants.

---

OUT OF TIME MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI
AND
MOTION TO RECALL MANDATE FROM DISTRICT COURT

Appellants, D. W. Browning Contracting Company, Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc. and Von-Aire, Inc., in the above captioned case, respectfully move for issuance of a stay of the mandate pursuant to Rule 41(b) and move for said stay out of time, and further move that the Court recall the mandate which issued on August 20, 1981.

In support of said motions, Appellants submit as follows:

1. Only July 29, 1981, the Court amended the caption to clarify that the named Appellants jointly and severally are the ones against whom the Order concerning attorneys' fees of July 17, 1981, is to be taxed. As that Order was clarified on July 29, 1981, Appellants respectfully suggest that perhaps the mandate here issued prematurely. In any event, Appellants also move to file the Motion For Stay Out of Time as Counsel for Appellants waited until the names of the Appellants were clarified to ascertain their wishes concerning the filing of a petition for a writ of certiorari.

2. The undersigned Counsel has been informed by the above named Appellants that they desire to petition the U. S. Supreme Court for a writ of certiorari from the decision of the Court filed on May 18, 1981, from which a timely petition for rehearing was denied on June 17, 1981, and which Order was further amended on July 29, 1981, correcting the names of the Appellants

against whom the Order was to run.

3. As the nature of the Court's Order of July 29, 1981, materially affects the Appellants against whom the mandate would run, it is respectfully suggested that the instant Motion For Stay Of Mandate is not out of time.

4. It is further respectfully moved that the mandate be stayed to and including the last date upon which a petition for certiorari in this case can be filed, which is September 15, 1981, or such further time not to exceed 60 days as the U. S. Supreme Court may grant.

5. The prolonged stay of mandate is respectfully requested as the Appellants are awaiting a decision of the Fifth Circuit in Central Florida Sheet Metal Contractors Association v. NLRB, No. 79-2396, which case was argued befoe a panel of that Court on October 29, 1980. For the same reasons, the Appellants are separately asking the U. S. Supreme Court for a 60 day extension of time to petition for a writ of certiorari.

6. In the Fifth Circuit, the Central Florida Sheet Metal Contractors Association, of which Appellants in the instant case were members at the time of the institution of the Fifth Circuit litigation, have urged that the National Stabilization Agreement for the Sheet Metal Industry (SASMI) (the identical trust fund agreement involved in the present case) is unlawful and, therefore, unenforceable by virtue of an unappealed ruling in Mobile Mechanical Contractors v. Carlough, 456 F. Supp. 320 (S.D. Ala. 1978), which case was argued and is pending before the same panel in the Fifth Circuit as No. 79-2054. Accordingly, it is Appellants' position herein that, in the event the Fifth Circuit agrees that SASMI is unlawful, the Appellants would then petition the U. S. Supreme Court urging that such ruling ought to be equally binding on the parties in the instant case and, therefore, costs and attorneys fees as this Court has now found to be appropriate ought in that circumstance to be set aside.

7. As the Fifth Circuit has not yet ruled, Appellants are not yet in a position to petition for certiorari but respectfully move this Court for a stay of its mandate so that further collateral proceedings will not be necessary in this matter.

8. Appellants in good faith suggest that there is a reasonable likelihood that the Fifth Circuit will agree that the unlawfulness of the SASMI fund, which remains unappealed in the Mobile Mechanical Contractors case, should likewise be the rule of the case for other parties challenging the legality of the identical trust fund.

9. Appellants further suggest that the equities of the situation call for the granting of this stay of the mandate so that the Appellants will not be obligated to make payments for failure to contribute to a Fund and related attorneys' fees, which may be found illegal by the U. S. Court of Appeals for the Fifth Circuit.

10. In further support of the Court's granting the stay out of time and

recalling the mandate, it is respectfully suggested that, in view of the number of Appellants that had to be contacted to obtain their consents to continued common action, and in view of the clarification of the named Appellants only having been made by the Court on July 29, 1981, are special circumstances why this motion should be granted out of time if it is not, in fact, timely in view of the intervening July 29, 1981, Order, and why the mandate should be recalled.

In view of all the aforesaid, it is respectfully moved that the mandate be stayed to and including the last day upon which a petition for certiorari can be filed in the above captioned cases, so that the filing of a timely petition will automatically stay the mandate further until ruling by the U. S. Supreme Court upon the petition.

Respectfully submitted,

/S/ Gerard C. Smetana
Gerard C. Smetana
Counsel for Appellants

Dated: August 26, 1981

APPENDIX R

UNITED STATES DISTRICT COURT OF APPEALS
For The District Of Columbia Circuit

NO. 78-1761 September Term, 1980
Civil Action No. 76-1957

National Stabilization Agreement of the Sheet Metal Industry Trust Fund, et al.

v.

FILED
Sept. 14, 1981
GEORGE A. FISHER
Clerk

D. W. Browning Contracting Company, Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc., and Von Aire, Inc.,

Appellants.

And Consolidated Case No. 78-2071

BEFORE: Tamm and Mikva, Circuit Judges; and Nichols*, Judge, United States Court of Claims

O R D E R

Upon consideration of appellants' (D. W. Browning Contracting Co., et al.) motion for recall and stay of mandate, and of appellees' opposition thereto, it is

ORDERED, by this Court, that appellants' aforesaid motion for recall and stay of mandate is denied.

Per Curiam
FOR THE COURT:

/S/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §293(a).

APPENDIX S

SUPREME COURT OF THE UNITED STATES

No. A-187

D. W. BROWNING CONTRACTING COMPANY, ET AL.,

Petitioners,

v.

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY, ET AL.

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

Upon Consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for write of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 14, 1981.

/S/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd
day of September, 1981

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND; and EDWARD J. CARLOUGH, WILLIAM R. MILLER, PAUL LYLE, KENNETH LOEHR, JACKSON GOODHUE and JAMES D. McGILL, Trustees of the National Stabilization Agreement of the Sheet Metal Industry Trust Fund;<br><br>1750 New York Avenue, N.W.<br>Washington, D. C. 20006<br>202/872-0717<br><br>Plaintiffs,<br><br>v.<br><br>ANNING-JOHNSON COMPANY; BLS COMMERCIAL REFRIGERATION; BILL'S COMMERCIAL HTG. & A.C.; COMMERCIAL ROOFING & SHEET METAL; D. W. BROWNING CONTRACTING CO.; E. C. GOLDMAN, INC.; FIREBAUGH & REYNOLDS; FLORIDA AIR CONDITIONING, INC.; GIFFEN INDUSTRIES; LAPIN SHEET METAL; NOUR'S REFRIGERATION; R & R INDUSTRIES, INC.; and VON-AIRE, INC.;<br><br>Defendants. | CIVIL ACTION 76-1957 |

COMPLAINT

1. This is an action brought pursuant

to Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132. Jurisdiction and venue are conferred upon this Court by 29 U.S.C. § 1132(e) and (f).

2. Plaintiff National Stabilization Agreement of the Sheet Metal Industry Trust Fund (hereinafter "SASMI Trust Fund") is a labor-management health and welfare trust fund created pursuant to the provisions of Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c), and authorized to sue in its own name by Section 502(d)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(d)(1). SASMI Trust Fund is administered in the District of Columbia by its Administrator from the SASMI Trust Fund's and the Administrator's principal place of business at 1750 New York Avenue, N.W., Washington, D. C. 20006.

3. Plaintiffs Edward J. Carlough, William R. Miller, Paul Lyle, Kenneth Loehr, Jackson Goodhue and James D. McGill (hereinafter "Trustees") are the Trustees of SASMI Trust Fund. They have been appointed and qualified as trustees

pursuant to the agreement and declaration of trust establishing SASMI Trust Fund.

4. At the present time, SASMI Trust Fund has been adopted in local areas throughout the United States. A list of the principal areas presently incorporating SASMI Trust Fund into their local collective bargaining agreements is attached hereto as Exhibit A.

5. As of October 15, 1976, approximately 22,000 sheet metal workers -- employed by more than 2,300 companies -- were covered by SASMI Trust Fund.

6. As of October 15, 1976, SASMI Trust Fund had paid out approximately $11 million in unemployment benefits to more than 5,000 sheet metal worker beneficiaries.

7. The defendants are fourteen of the seventeen sheet metal contractors obligated to make payments to SASMI Trust Fund at 1750 New York Avenue, N.W., Washington, D.C. 20006 beginning as of August 1, 1976, pursuant to a contract entered into on October 21, 1974 by the Central Florida Sheet Metal Contractors Association. A copy of this collective bargaining agreement and its ten Addenda (hereinafter

"Agreement"), effective as of August 1, 1974, is attached as Exhibit B hereto. Pursuant to this Agreement and its Addenda, the seventeen sheet metal contractors in central Florida agreed to make monthly contributions to SASMI Trust Fund for all months beginning with the month of August, 1976 through the date of termination of the collective bargaining agreement in the amount of three percent (3%) of the gross earnings of each employee subject to the SASMI Trust Fund.

8. All payments due SASMI Trust Fund are supposed to be mailed to SASMI Trust Fund at 1750 New York Avenue, N.W., Washington, D. C. 20006. The required payments are calculated pursuant to a SASMI Fund Remittance Report form required to be prepared by each contractor. The completed Remittance Report and accompanying payment are due the SASMI Trust Fund within fifteen days after the end of each calendar month. These reports and remittances are considered delinquent after the fifteenth day.

9. Beginning with the month of August, 1976, three of the seventeen sheet metal contractors in central Florida began forwarding their SASMI Remittance Reports and SASMI Trust Fund payments to:

"SASMI Fund
1750 New York Avenue, N.W.
Washington, D. C."

See, for example, the SASMI Remittance Reports and checks payable to the SASMI Fund sent to the SASMI Trust Fund by Daytona Sheet Metal Works and McDonald Air Conditioning, Inc., for the month of August, 1976, attached hereto as Exhibits C and D. These three sheet metal contractors in central Florida have abided by their olbigations to the SASMI Trust Fund and the Trustees, and are not defendants in this action.

10. However, beginning with the month of August, 1976, the other fourteen of the seventeen sheet metal contractors in central Florida, the defendants herein, began refusing to forward their SASMI Trust Fund payments to SASMI Trust Fund at 1750 New York Avenue, N.W.,

Washington, D. C. 200006. Instead, some or all of these fifteen defendants deposited said SASMI Trust Fund payments in escrow accounts variously denominated as "SASMI Escrow Fund" or "National SASMI Fund," thereby breaching their obligations to SASMI Trust Fund and the Trustees.

11. For example, the Remittance Report of defendant D. W. Browning Contracting Co. for the month of August, 1976, was mailed, as required, to "SASMI Fund, 1750 New York Avenue, N.W., Washington, D. C. 20006." (See Exhibit E attached hereto showing amounts due to SASMI Trust Fund by defendant D. W. Browning Contracting Co. for the month of August, 1976.)

This Remittance Report shows on its face:

"Make Check Payable and Send To:

SASMI Fund
1750 New York Avenue, N.W.
Washington, D. C." (See Exhibit E.)

But the defendant D. W. Browning Contracting Co. did not send to SASMI Trust Fund its required check payable to SASMI Fund along with its Remittance Report. Instead, defendant D. W. Browning Co.

wrote to SASMI Fund that it had opened an escrow account with SASMI's money in the name of:

"National SASMI Fund
c/o D. W. Browning" (See Exhibit F.)

12. The defendants R & R Industries Inc. and Von-Aire, Inc. similarly sent their required Remittance Reports for the month of August, 1976 to SASMI Trust Fund, 1750 New York Avenue, N.W., Washington, D. C. 20006. (See Exhibits G and H.) But these defendants did not send to SASMI Trust Fund theie required checks payable to SASMI Fund along with their Remittance Reports. Instead they opened escrow accounts with SASMI's money -- i.e., "R & R Industries, Inc. SASMI Escrow Fund" and "Von-Aire, Inc. (SASMI) Escrow Fund." (See Exhibits G and H.)

13. The remaining defendants also have not mailed their required checks payable to SASMI Fund to the SASMI Trust Fund for the month of August, 1976.

14. The total amount of SASMI Trust Fund money owed to and being withheld from the SASMI Trust Fund by the defendants for the months of August and September, 1976 is approximately

$16,000.00. This amount will increase by approximately $8,000 each month that the defendants continue to refuse to pay to SASMI Trust Fund the monthly payments due to SASMI Trust Fund.

15. Unless ordered by this Court, defendants will continue to refuse to pay to SASMI Trust Fund the payments due to SASMI Trust Fund.

16. Plaintiffs are entitled to all the expenses of collection incurred by the Trustees, including reasonable attorneys' fees and costs of this action, pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1332(g).

17. A copy of this complaint will be served upon the Secretary of Labor and the Secretary of the Treasury by certified mail as required by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(h).

WHEREFORE, plaintiffs demand judgment against the defendants:

(1) restraining and enjoining defendants, their officers, agents, servants, attorneys, and all persons active on their behalf or in conjunction

with them from refusing to pay to plaintiffs all funds due to the SASMI Trust Fund from and after August 1, 1976, with interest;

(2) requiring defendants to pay to plaintiffs a reasonable attorney's fee and the costs of this action, as provided by Section 502(g) of the Employee Retirement Income Security Act olf 1974, 29 U.S.C. § 1132(g); and

(3) granting plaintiffs such further and other relief as may be just and proper in the premises.

ROGOVIN, STERN & HUGE

By David Klein
Harry Huge
Gerald M. Stern

1730 Rhode Island Ave.,N.W.
Suite 600
Washington, D. C. 20036
202/296-5820

Attorneys for Plaintiffs

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND; and EDWARD J. CARLOUGH, WILLIAM R. MILLER, PAUL LYLE, KENNETH LOEHR, JACKSON GOODHUE and JAMES D. McGILL, Trustees of the National Stabilization Agreement of the Sheet Metal Industry Trust Fund;<br><br>Plaintiffs,<br><br>v.<br><br>ANNING-JOHNSON COMPANY; BLS COMMERCIAL REFRIGERATION; BILL'S COMMERCIAL HTG. & A.C.; COMMERCIAL ROOFING & SHEET METAL; D. W. BROWNING CONTRACTING CO.; E. C. GOLDMAN, INC.; FIREBAUGH & REYNOLDS; FLORIDA AIR CONDITIONING, INC.; GIFFEN INDUSTRIES; LAPIN SHEET METAL; NOUR'S REFRIGERATION; R & R INDUSTRIES, INC.; and VON-AIRE, INC.;<br><br>Defendants. | CIVIL ACTION 76-1957 |

MOTION OF DEFENDANTS E. C. GOLDMAN, INC., D. W. BROWNING CONTRACTING CO., LAPIN SHEET METAL, R & R INDUSTRIES, INC., VON-AIRE, INC., AND TOM CLEMENTS, INC. TO DISMISS OR STAY PROCEEDINGS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Defendants E. C. Goldman, Inc., D. W. Browning Contracting Co., Lapin Sheet Metal, R & R Industries, Inc., Von-Aire, Inc., and Tom Clements, Inc. (hereinafter referred to collectively as the "Answering Defendants") move that the Complaint herein be dismissed. The grounds for dismissal are that the subject matter of the Complaint is within the pre-emptive and exclusive jurisdiction of the National Labor Relations Board (hereinafter referred to as the "NLRB") and that the NLRB has already asserted its jurisdiction in this matter by issuing a complaint averring that the agreements sought herein to be enforced were obtained through coercive conduct prohibited by the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., and Section 302 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186.

Further, Thomas Clements, Inc. (hereinafter referred to as "Clements") moves individually to dismiss as to it on the grounds that although served with a summons and Complaint, the Complaint nowhere names

it as a defendant and accordingly states no cause of action as to Clements.

In the alternative, the Answering Defendants move that the instant proceeding be stayed pending the disposition of the case currently before the NLRB, in view of the commity due a federal agency which has asserted prior jurisdiction, lest inconsistent and conflicting remedies arise from the multiple proceedings in different forums.

In the further alternative, the Answering Defendants move for summary judgment on the grounds that the Stabilization Agreement of the Sheet Metal Industry Trust (hereinafter referred to as "SASMI"), which trust plan the Plaintiffs herein seek to enforce, violates Section 302 of the Labor-Management Relations Act both on its face and as applied to the Answering Defendants.

Respectfully submitted,

THOMAS CANAFAX, JR.
BURT A. BRAVERMAN
Borovsky, Smetana,
Ehrlich & Kronenberg
2011 Eye St., N.W.
Washington, D.C. 20006
120 So. La Salle St.
Chicago, Ill. 60603
(312) 368-8500
Attorneys for Defendants

## APPENDIX V

## STATUTES INVOLVED

A. Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, provides in relevant part:

(a) A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief

(i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the

administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

* * * *

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

B. Sections 302(a), (b) and (c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(a), (b) and (c)(5), in pertinent part reads:

(a) It shall be unlawful for any employer or association of employers ... to pay ... or agree to pay ... any money ... .
(1) to any representative of any of his employees who are employed in an industry affecting commerce; or
(2) to any labor organization, or any officer or any employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

* * * *

(b) It shall be unlawful for any person to request, demand, receive, or accept ... any payment ... of any money ... prohibited by subsection (a).

* * * *

(c) The provisions of this section, shall not be applicable ... (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer ... Provided, That (A) such payments are held in trust for the purpose of paying ... unemployment benefits or life insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund ... .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

C. Section 301 of the Labor Management Act

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, provides in relevant part:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

D. Section 502 of the Employment Retirement Security Act of 2974 as amended by Section 306(a) and 306(b) of the Multiemployer Pension Plan Amendments Act of 1980, Public Law No. 96-364, 94 Stat. 1208 effective September 26, 1980, 29 U.S.C. § 1145 (1981) and 29 U.S.C. §§ 1132(g)(1) and (2).

ACT SEC. 306, LIQUIDATED DAMAGES WITH RESPECT TO DELINQUENT CONTRIBUTIONS.

Act Sec. 306(a) Part 5 of subtitle B of title I is amended by adding after section 514 the following new section:

[ERISA Sec. 515]

"DELINQUENT CONTRIBUTIONS

"Sec. 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such

contributions in accordance with the terms and conditions of such plan or such agreement.".

Act Sec. 306(b) Section 502 is amended by --

(1) redesigning subsection (b)(1) and (2) as subsection (b)(1)(A) and (B), and adding at the end thereof the following new paragraph:

"(2) The Secretary shall not initiate an action to enforce section 515.".

ERISA Sec. 502(g), as amended by Act Sec. 306(b)(2), reads:

(g)(1) In any action under this title (other than an acton described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of --

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court may deem appropriate.

# Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-941

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

---

D. W. BROWNING CONTRACTING CO.,
TOM CLEMENTS, INC.
E. C. GOLDMAN, INC., LAPIN SHEET METAL
R & R INDUSTRIES, INC., AND VON-AIRE, INC.
*Petitioners.*

v.

NATIONAL STABILIZATION AGREEMENT OF THE
SHEET METAL INDUSTRY TRUST FUND, ET AL.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

HARRY HUGE
DAVID R. BOYD
EUGENE J. COMEY
KRISTA M. FOGLEMAN
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464
*Counsel for Respondents*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS


| | Page |
|---|---|
| I. STATEMENT OF THE CASE | 2 |
| II. ARGUMENT | 7 |
| A. There Are No Special Or Important Reasons That Warrant This Court's Review Of Petitioners' First Question | 7 |
| B. The Courts Below Properly Declined To Rule On The Merits Of Petitioners' Structural Challenge To SASMI | 9 |
| C. The Award Of Attorneys' Fees Was Proper And Presents No Issue Worthy Of Discretionary Review | 12 |
| D. This Case Bears No Substantial Similarities To *Mullins v. Kaiser Steel Corp.* That Would Warrant The Grant Of Certiorari Or Deferral Of This Petition To Await The Disposition Of That Case | 16 |
| III. CONCLUSION | 17 |

## TABLE OF AUTHORITIES


| *Cases:* | Page |
|---|---|
| *Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974) | 11, 12 |
| *Arroyo v. United States*, 359 U.S. 419 (1959) | 4 |
| *Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222 (3d Cir. 1977) | 10 |
| *Blassie v. Kroger Company*, 345 F.2d 58 (8th Cir. 1965) | 11 |
| *Central States Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 492 F. Supp. 906 (E.D. Mich. 1980) | 17 |
| *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975) | 11-12 |
| *Costello v. Lipsitz*, 547 F.2d 1267 (5th Cir.), *cert. denied*, 434 U.S. 829 (1977) | 11 |
| *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972) | 15 |
| *Employing Plasterers' Association v. Journeymen Plasterers' Protective & Benevolent Society Local 5*, 279 F.2d 92 (7th Cir. 1960) | 10 |
| *Fusari v. Steinberg*, 419 U.S. 379 (1975) | 15 |
| *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980) | 15, 17 |
| *Mobile Mechanical Contractors' Association v. Carlough*, 382 F. Supp. 1134 (S.D. Ala. 1974), *aff'd in part, vacated in part, and appeal dismissed*, 566 F.2d 1213 (5th Cir. 1977), *on remand*, 456 F. Supp. 310 (S.D. Ala. 1978), *appeal docketed*, No. 79-2054 (11th Cir. May 2, 1979) | 3, 8, 10-11 |
| *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *cert. granted*, 101 S.Ct. 2044 (1981) (No. 80-1345) | 12, 16 |
| *NLRB v. Amax Coal Co.*, 101 S.Ct. 2789 (1981) | 5 |
| *Quad City Builders Association v. Tri City Bricklayers Union No. 7*, 431 F.2d 999 (8th Cir. 1970) | 11 |
| *Sheet Metal Workers' International Association*, 234 N.L.R.B. 1238 (1978) | 3, 4 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Snider v. All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974) | 10 |
| *Thomas v. Reading Anthracite Co.*, 264 F. Supp. 339 (M.D. Pa. 1966) | 11 |
| *Statutes:* | |
| National Labor Relations Acts: | |
| 29 U.S.C. § 157 | 12 |
| 29 U.S.C. § 158 | 12 |
| 29 U.S.C. § 158(b)(1)(B) | 5, 8 |
| Labor-Management Relations Act of 1947: | |
| 29 U.S.C. § 186(c) | 2 |
| 29 U.S.C. § 186(e) | 9 |
| Employee Retirement Income Security Act of 1974: | |
| 29 U.S.C. § 1104 | 2 |
| 29 U.S.C. § 1132 | 3 |
| 29 U.S.C. § 1132(a)(3) | 13 |
| 29 U.S.C. § 1132(e)(1) | 14 |
| 29 U.S.C. § 1132(e)(2) | 14 |
| 29 U.S.C. § 1132(f) | 14 |
| 29 U.S.C. § 1132(g) | 7, 14, 17 |
| Multiemployer Pension Plan Amendments Act of 1980: | |
| 29 U.S.C. § 1132(g)(2)(D) | 14 |
| 29 U.S.C. § 1461(e) | 15 |
| *Rules:* | |
| Sup. Ct. R. 21.1(b) | 2 |
| *Miscellaneous:* | |
| Agreement and Declaration of Trust Establishing the National Stabilization Agreement of the Sheet Metal Industry Trust Fund (1974) | 11, 13 |
| Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Browning Contracting Co. v. National Stabilization Agreement of the Sheet Metal Industry Trust Fund*, No. 81-941 (October Term, 1981) | *passim* |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-941

---

D. W. BROWNING CONTRACTING CO.
TOM CLEMENTS, INC.
E. C. GOLDMAN, INC., LAPIN SHEET METAL
R & R INDUSTRIES, INC., AND VON-AIRE, INC.
*Petitioners.*

v.

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, ET AL.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

Respondents National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI" or "SASMI Trust Fund") [1] and the SASMI Trustees [2] respectfully

---

[1] SASMI is a comprehensive supplemental employment compensation plan covering approximately 25,000 participating sheet metal workers nationwide. SASMI was created to foster the economic welfare and security of employees in an industry vulnerable to economic instability; its primary goal is to minimize hardships caused by factors beyond the control of employees. To this end, SASMI benefits are paid to supplement the loss of wages incurred during the periods of less than full employment. To date, SASMI

request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.[3]

## I. STATEMENT OF THE CASE

This is a simple collection case of the kind brought all over the country by trust funds operating under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §§ 141-187. The petition in this case presents no issues warranting this court's review, and none on which the lower courts have disagreed. The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit therefore should be denied.

As the district court found, the petitioner contractor members of the Central Florida Sheet Metal Contractors

---

has paid over $50 million of these unemployment benefits to needy sheet metal worker beneficiaries.

As required by § 302(c) of the LMRA, 29 U.S.C. § 186(c), and by § 404 of ERISA, 29 U.S.C. § 1104, the SASMI Trust Fund is organized and administered for the sole and exclusive benefit of its participants and beneficiaries. SASMI is currently administered by six trustees, half of whom are appointed by labor and management, respectively. The current trustee selection provisions—instituted in 1974—differ from the earlier selection provisions that petitioners have sought to challenge in this litigation.

[2] Notwithstanding Rule 21.1(b), petitioners did not include in the Petition a list of all parties to this proceeding in the court of appeals. In addition to the parties listed in the caption, Respondents here consist of Edward J. Carlough, Kenneth Loehr, Manuel Silvia, Michael Martina and James F. Bean. The sixth trustee position is currently vacant, and election proceedings are underway to fill that vacancy.

[3] All references to the petition for a writ of certiorari in this case are cited to the page number in the Petition, *e.g.*, Pet. at ——, and references to the Appendices of that Petition are cited as Pet. App. at ——. All references to the Appendix to the Respondents' Brief In Opposition in this case are cited to the page number in that Appendix as "Resp. App. at ——."

Association, Inc. ("CFSMCA") entered into a collective bargaining agreement in October of 1974, stipulating that they would make payments to the SASMI Trust Fund beginning in August of 1976. Rather than make their agreed-upon contributions, however, the member contractors unilaterally placed those funds in escrow accounts and embarked on prolonged litigation attacking SASMI here and before the National Labor Relations Board ("the NLRB" or "the Board").[4] This petition represents the culmination of those efforts, which have now been maintained for more than five years while the petitioners' required contributions to SASMI have been withheld.

In October of 1976, SASMI instituted this action in the United States District Court for the District of Columbia pursuant to section 502 of ERISA, 29 U.S.C. § 1132, to collect the delinquent contributions of CFSMCA members. SASMI's complaint charged that the CFSMCA members had agreed to contribute to SASMI, and that each of the petitioner contractors was in default of that obligation. SASMI supported its allegations with affidavits and other competent proof and moved for summary judgment in November of 1976.

The petitioner CFSMCA members never filed an answer or counterclaim. Instead, they filed motions for dismissal, stay or summary judgment, together with affidavits admitting that they had agreed to contribute to SASMI for the benefit of their employees. Petitioners contended, however, that alleged structural defects in the trustee selection provision in effect in 1974 provided a complete defense to the obligations they had assumed. Petitioners advanced this contention not withstanding the fact that

---

[4] *See Sheet Metal Workers' Int'l Ass'n*, 234 N.L.R.B. 1238 (1978). *See also Mobile Mechanical Contractors' Ass'n v. Carlough*, 382 F. Supp. 1134 (S.D. Ala. 1974), *aff'd in part, vacated in part, and appeal dismissed*, 556 F.2d 1213 (5th Cir. 1977), on remand, 456 F. Supp. 310 (S.D. Ala. 1978), *appeal docketed*, No. 79-2054 (11th Cir. May 2, 1979).

the trustee selection provision had been amended in December of 1974, some two months after the collective bargaining agreement was signed and some 18 months prior to petitioners' first required contributions to the fund. The petitioner contractors further asserted that questions related to the SASMI trustee selection provisions had been submitted to the NLRB and admitted that they had unilaterally withheld their contributions to SASMI to await the Board's resolution of that matter.

The petitioner contractors' principal position in the district court was that only the Board had jurisdiction to decide the issues they had raised.[5] Alternatively, petitioners contended that they were entitled to summary judgment dismissing SASMI's attempt to collect the overdue contributions. The district court denied petitioners' motion for summary judgment and granted SASMI's. As that court explained, its denial of petitioners' motion rested on a number of grounds, any one of which would have been sufficient to sustain its ruling:

> To summarize, the Court has concluded that (1) no authority exists for the proposition that an "equal representation" complaint is a sufficient defense to an ERISA claim; (2) a remedy which exonerated defendants from having to meet their payments obligations under the 1974 contract would be inappropriately broad; (3) in any event, the statutory provision which authorizes the Court to act in these situations

---

[5] In this regard the petitioner contractors did not seriously assert that these alleged structural defects resulted in any of the kinds of abuses that § 302 was designed to prevent. *Cf. Arroyo v. United States*, 359 U.S. 419 (1959). Although the CFSMCA's unfair labor practice complaint was initially favorably received by an NLRB Administrative Law Judge, the Board disagreed and dismissed the complaint. 234 N.L.R.B. at 1238. This decision is now on appeal in the Fifth Circuit. *Sheet Metal Workers' Int'l Ass'n, supra.* Shortly thereafter, the district court in this case denied the petitioner contractors' motion for summary judgment and granted SASMI's.

> does not permit the remedy requested; . . . and (4) in light of the NLRB's rulings, defendants have waived their right to raise the equal representation question. The Court emphasizes that in its view any one of these factors is sufficient to require the rejection of defendants' arguments and the grant of summary judgment to plaintiffs, considered together these factors compound the strength of plaintiffs' position.

Pet. App. at 31-32. The district then granted SASMI's motion for an award of attorneys' fees.

Petitioners appealed both the district court's grant of summary judgment and its award of attorneys' fees. Petitioners argued on appeal that ERISA provided a forum to raise defenses based on section 302 of the LMRA to collection suits brought under ERISA. Petitioners further maintained that the district court had determined that it lacked jurisdiction to hear or rule on their challenge asserting SASMI's alleged structural defects, and that the district court's decision left them without a forum for their claim.[6]

The court of appeals affirmed, finding that the district court had correctly declined to decide petitioners' structural challenges to SASMI since "a remedy exonerating defendant-appellants from their contractual obligation is inappropriately broad in these circumstances . . . ." Pet. App. at 2. Rejecting the petitioners' contention that they had been deprived of the ability to raise their section 302 challenge, the court stated:

> [Petitioner has] misapprehended the nature of the district court's conclusion. The district judge did not

---

[6] Petitioners also argued that trustees of § 302(c) funds are "representatives" of their appointing parties within the meaning of § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). That argument was not decided by the court of appeals, Pet. App. at 9, but subsequently was rejected by this Court. *NLRB v. Amax Coal Co.*, 101 S.Ct. 2789, 2796 (1981).

> decide that a district court had no jurisdiction over allegations of section 302(c)(5) infirmities. Rather, as she explicitly recognized, . . . , a district court has express jurisdiction under section 302(e) of the LMRA to "restrain violations" of section 302 requirements. [Petitioners] chose not to invoke that jurisdiction, however, apparently relying upon the alleged equal representation violation as a total defense to SASMI's claim for delinquent contributions. [The district court] determined that this asserted defect was *insufficient* to obviate the Association's contractual obligation; she did not refuse appellants their requested relief on jurisdictional grounds, as they now contend.

Pet. App. at 9-10 (emphasis in original).

As the court of appeals later emphasized, petitioners had no basis for their claim that the district court's action denied them a forum for their claims of SASMI's structural defects.

> . . . [T]wo related factors make [not allowing assertion of a structural defect to defeat a collection suit] particularly appropriate here: [petitioners'] failure to invoke the well-established forum for the resolution of structural allegations, and the delay in asserting such allegations. *As we have been at some pains to point out in this opinion, appellants had, and indeed still have, recourse to the civil preventive remedy provided in section 302(e). . . .*
>
> *Despite the acknowledged importance of this remedy [the right to raise claims under § 302(e)] however, [petitioners] chose not to avail themselves of its benefits—either during the two-year interval between the conclusion of the bargaining agreement and the commencement of the agreed-upon payments, or when the payment obligation matured. They simply breached that obligation.*

*Id.* at 20 (emphasis added); *see also id.* at 22.

The court of appeals thus affirmed the district court's decision on the merits, as well as its discretionary award of attorneys' fees pursuant to section 502(g) of ERISA, 29 U.S.C. § 1132(g). Upon motion and briefing by all parties, the court of appeals subsequently awarded the respondents attorneys' fees for the appeal.

## II. ARGUMENT

### A. There Are No Special Or Important Reasons That Warrant This Court's Review Of Petitioners' First Question.

Petitioners put their first question as follows: "May a collection suit under the Employee Retirement Income Security Act of 1974 be maintained if the requirements of Section 302 of the Labor Management Relations Act have not been met?" Pet. at i. The precise issue that petitioners seek to raise through this question is not entirely clear, since the question is never directly addressed in the Argument portion of the Petition. It appears, however, that petitioners seek to raise a jurisdictional issue—namely whether a Section 302(e) trust fund can maintain a suit for collection of delinquent contributions if a challenge is raised to the fund's provisions for selection of trustees.

Petitioners presumably are not asking this Court to issue a writ of certiorari to determine whether a trust fund can maintain and prosecute an ERISA collection suit if its delinquent contributors merely *allege* that the fund's trustee selection provisions violate Section 302(c) of the LMRA. No federal court has ever ruled that the mere allegation of a defect in trustee selection provisions deprives a trust fund of its right to proceed under ERISA to collect delinquent contributions. Instead, petitioners

appear to argue that the District Court for the District of Columbia did not have jurisdiction in 1976 to hear SASMI's claim for payment of delinquent contributions because the former SASMI trustee selection provision had been declared illegal in 1974 by another federal district court. *See* Pet. at 28-29, referring to *Mobile Mechanical Contractors Ass'n v. Carlough*, 382 F.Supp. 1134 (S.D. Ala. 1974), *aff'd in part, vacated in part, and appeal dismissed*, 566 F.2d 1213 (5th Cir. 1977), *on remand* 456 F. Supp. 310 (S.D. Ala. 1978), *appeal docketed*, No. 79-2054 (11th Cir. May 2, 1979).

One simple fact, which petitioners neglect to mention, establishes that this jurisdictional issue is not worthy of this Court's review: the 1974 trustee selection provision declared illegal by the district court in *Mobile Mechanical* was amended by the trustees before petitioners' payment obligations matured in August of 1976 and before the trust fund commenced this suit in October of 1976. *See* 566 F.2d, at 1216-17.[7] Moreover, there is no finding in this record that the trustee provision in effect at those relevant points in 1976 violated Section 302(c)(5) of the LMRA.

Thus, the issue petitioners apparently would have this Court review is whether a federal district court is deprived of jurisdiction to adjudicate a trust fund's claim

---

[7] It should be noted that on appeal from the district court's order declaring this trust provision invalid, the Fifth Circuit ruled that the district court lacked jurisdiction under § 302(e) to enter a declaratory judgment as to the provision's invalidity in the past, and that the district court could only enter relief designed to prevent continuation of any violation in the future. 566 F.2d at 1219-20.

Petitioners had argued in the lower courts that the SASMI trustee selection provisions remained invalid because they failed to recognize that each trustee is a "representative" of his appointing party under § 8(b)(1)(B), 29 U.S.C. § 158(8)(b)(1)(B). *See* note 5, *supra*. This Court's decision in *NLRB v. Amax Coal Co.*, *supra*, rejected that position.

under ERISA for payment of delinquent contributions simply because a *prior* version of its trustee selection provision had been successfully challenged and subsequently amended. Respondents respectfully suggest that the question on its face is not worthy of review.

### B. The Courts Below Properly Declined To Rule On The Merits Of Petitioners' Structural Challenge To SASMI.

Petitioners' second and third questions appear to be variations of the same theme, each asking whether in a collection suit filed by an ERISA trust fund, a federal court *must* decide the merits of a defense alleging a structural defect in the trustee selection procedures of that fund. The courts below properly decided that this so-called defense need not be resolved, since petitioners' establishment of any such technical deficiency in the structure of the fund would not absolve petitioners from their contribution obligations. Petitioners have not pointed to any conflict on this issue and have not demonstrated that it was wrongly decided, much less worthy of this Court's discretionary review.

As the district court pointed out, its equitable powers under section 302(e) of the LMRA, 29 U.S.C. § 186(e), were never properly invoked. The district court stated:

> At the outset, the Court notes that the only claim pending before it is a suit by the SASMI trust fund and its Trustees pursuant to the Employee Retirement Income Security Act. Defendants have never filed an answer or a counterclaim in this suit asking the Court to act pursuant to § 302(e) of the Labor Management Regulations Act to "restrain violations" of the equal representation requirement of § 302(c)(5). Instead, defendants have raised the equal representation question as a defense in the ERISA action.

Pet. App. at 28. The court of appeals made a similar observation:

> [Petitioners] in this case could have followed this well-established procedure in determining the struc-

> tural validity of the SASMI fund. They could have instituted a suit under section 302(e), requesting the district court to enjoin any existing violations of the structural requirements of section 302(c)(5). Appellants chose, however, to disavow their contractual obligation and to assert their claims of structural defects as justification for this disavowal. When the district court subsequently rejected this attempted justification, appellants filed this appeal, claiming that the district court wrongly ignored the federal common law developed under section 302.

*Id.* at 14. Noting caustically that petitioners were "[h]ardly in a comfortable position to accuse anyone of ignoring the relevance of section 302 law," *id.*, the court of appeals determined that the petitioners' claim had not been raised as a section 302(e) claim for equitable relief, which would have invoked the court's full power to review the merits of the claims. *Id.* at 15.

The court of appeals additionally agreed with the district court's ruling that resolution of the petitioners' ineptly-raised structural challenge to the SASMI Trust Fund was not required, since petitioners' establishment of a defect in the SASMI trustee selection provisions would not, in any event, excuse them from their obligations to contribute to SASMI. In this regard, both courts were clearly correct.

The federal courts' powers under section 302(e) of the LMRA to cure structural deficiencies in labor management trust funds is an equitable power. *See, e.g., Associated Contractors of Essex County, Inc. v. Laborers International Union*, 559 F.2d 222, 225 (3d Cir. 1977); *Employing Plasterers' Association v. Journeymen Plasterers' Protective & Benevolent Society Local 5*, 279 F.2d 92, 97 (7th Cir. 1960).

This equitable power generally has been recognized to be prospective in nature, *see, e.g., Snider v. All State Administrators, Inc.*, 481 F.2d 387, 390 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); *Mobile Mechanical Con-*

*tractors Association v. Carlough*, 566 F.2d 1213, 1219 (5th Cir. 1978), on remand, 456 F. Supp. 310 (S.D. Ala. 1978), *appeal docketed*, No. 79-2054 (11th Cir. May 2, 1979); *Blassie v. Kroger Co.*, 345 F.2d 58, 67 (8th Cir. 1965). Equally important, federal courts exercising their equitable powers under section 302(e) have taken care to fashion their relief in a manner that corrects any structural defects they find while assuring that the remainder of the trust remains solvent and unimpaired. *See, e.g., Costello v. Lipsitz*, 547 F.2d 1267, 1278, n. 38 (5th Cir.), *cert. denied*, 434 U.S. 829 (1977); *Quad City Builders Association v. Tri City Bricklayers Union No. 7, supra; Thomas v. Reading Anthracite Coal Co.*, 264 F. Supp. 339 (M.D. Pa. 1966). Moreover, in this case, the SASMI Trust Agreement that was enforced contained a severability provision, requiring that any provision later deemed to be unlawful shall not adversely affect the remaining provisions unless such illegality makes the fund's continuing operation illegal or impractical. *See* SASMI Trust Agreement, Article XII, Section 8 (1974), Resp. App. at 21a.

Under all of these circumstances, the decision of the lower courts to refrain from adjudicating the petitioners' structural challenges advanced as a justification to "disavow their contractual obligation," Pet. App. at 14, is not subject to legitimate question.[8] Petitioners' second and third questions certainly do not merit this Court's review.

---

[8] Petitioners argue that by not deciding that issue, the court of appeals "ignored the now settled principle that federal courts have jurisdiction to decide collateral federal labor law questions," Pet. at 33, *citing Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975) and *Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974). Again, petitioners are mistaken. While this Court's opinions in *Connell* and *Arnold* recognize that federal courts have jurisdiction over such matters and "may" decide such questions, neither holds that a court *must* decide all such matters.

### C. The Award Of Attorneys' Fees Was Proper And Presents No Issue Worthy Of Discretionary Review.

Petitioners' fourth and final question asks whether ERISA authorizes a federal court to award attorneys' fees in a collection suit where a section 302(c)(5) structural defect is raised as a defense and where "the nature of the suit is more akin" to a suit to enforce a collective bargaining agreement under section 301 of the LMRA. Petitioners' purported description of the issue is either disingenuous or inept. In either case, the court of appeals' decision is correct and does not require this Court's review.

Petitioners contend, with no support in the record, that this collection suit "is not an ERISA suit," but "in actuality predicated upon Section 301" of the LMRA, Pet. at 35, 36, a statute that does not provide for attorneys' fees. This would certainly come as a surprise to the courts below, since the complaint rests exclusively on ERISA jurisdiction, *see* Pet. App. at 104, and since petitioners never contended in the district court or the court of appeals that this was in fact a cleverly disguised LMRA case. It is quite clear that petitioners' argument is a recent invention, newly contrived in an effort to tie this case to *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *cert. granted*, 101 S.Ct. 2044 (1981) (No. 80-1345).

In this case, section 502 of ERISA was the only jurisdictional basis offered. This collection action was insti-

---

The opinion in *Connell* simply states, "This Court has held, however, that the federal courts *may* decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies . . . ." 421 U.S. at 626 (emphasis added). And *Arnold* holds only that in a suit brought under LMRA § 301, the court's jurisdiction is not divested simply because the case involves activity either arguably protected by § 7 of the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. § 157, or arguably prohibited by § 8 of that Act, 29 U.S.C. § 158. 417 U.S. at 15-16.

tuted "to enforce . . . the terms of the plan," 29 U.S.C. § 1132 (a) (3), through application of the terms of the SASMI Trust Agreement quoted below.[9] In addition, the SASMI Trust Agreement contains a clear basis for an award of attorneys' fees that supplements the district court's discretionary authority under section 502 of ERISA.[10] Thus, petitioners' attempt to gain review of this case by contending that it is more like a suit under

---

[9] The SASMI Trust Agreement provided as follows:

> RATE OF CONTRIBUTIONS
>
> In order to effectuate the purpose [of the trust agreement], each Employer shall contribute to the Fund the amount required by the Collective Bargaining Agreement between the Local Union and the Employer. The rate of contribution shall at all times be governed by the aforesaid Collective Bargaining Agreement then in force and effect.

Agreement and Declaration of Trust Establishing The National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI Trust Agreement"), Article V, Section 1 (1974). Resp. App. at 12a.

[10] The SASMI Trust Agreement also includes the following provision:

> DEFAULT IN PAYMENT
>
> The trustees may take any action necessary to enforce payment of the contributions due hereunder, including but not limited to, proceedings at law and equity. . . . In addition to any other remedies to which the parties may be entitled, an Employer in default for ten (10) days may be required at the discretion of the Trustees to pay interest at the rate specified for an Employer under his collective bargaining agreement with respect to delinquent payments into other fringe benefit funds or, at the option of the Trustees, at a higher rate up to the highest rate of interest permissible under the law of the state in which the delinquent Employer is located, from the date when the payment was due to the date when payment is made, *together with all expenses of collection incurred by the Trustees, including but not limited to counsel fees.*

SASMI Trust Agreement, Article V, Section 4 (1974), Resp. App. at 13a (emphasis added).

the LMRA than ERISA lacks foundation in the record, and must fail.

Petitioners also complain that the court of appeals improperly relied on the 1980 amendments to ERISA in determining to award fees here,[11] even though it is not altogether clear how that issue relates to the question they posed. This issue, if indeed raised by petitioners' fourth question, certainly does not merit this Court's review.

The court of appeals did not rely on the 1980 amendments to ERISA in affirming the district court's award of attorneys fees, as it clearly indicated by its citation of the earlier statute and by its characterization of the district court's award as discretionary in nature. Pet. App. at 21. Moreover, while the court of appeals did not specifically state which statute it was relying on to award fees for the appeal, either the 1980 amendments or the earlier fee award provision of ERISA provide ample authority for that award.

Even prior to the 1980 amendments, section 502(g) of ERISA provided that "the court" could, in its discretion, allow a reasonable attorney's fee to either party. 29 U.S.C. § 1132(g). Since other subsections of that same provision speak to the powers of the "district court," *see, e.g.*, 29 U.S.C. § 1132(e)(1), (e)(2), (f), the broader lan-

---

[11] Prior to the 1980 amendments, ERISA stated, "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." ERISA § 502(g), 29 U.S.C. § 1132(g).

After the 1980 amendments, that provision became the following:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 [the new ERISA provision regarding delinquent contributions to a multiemployer plan] in which a judgment in favor of the plan is awarded, the court shall award the plan . . . . reasonable attorney's fees and costs of the action, to be palid by the defendant . . . .

ERISA § 502(g)(2)(D), as amended, 29 U.S.C. §1132(g)(2)(D) (1980).

guage in the attorneys' fee provision provides clear authority for fee awards at the appellate level as well as in the district courts. ERISA is remedial legislation and "should be construed liberally in favor of those persons it was meant to benefit and protect, namely, participants in and beneficiaries under covered pension and welfare plans . . . ." *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980). Certainly interpretation of that section in a manner that allowed the discretionary award of fees on appeal would best serve the general policies of ERISA.

Equally important, the court of appeals would have been justified in relying on the ERISA attorneys' fee award provision as amended in 1980 as a basis for the award of fees on appeal. As a general rule, federal courts should apply the law existing at the time the case is decided. *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). The 1980 amendments to ERISA were effective on September 26, 1980, *see* 29 U.S.C. § 1461(e), before the appeal was argued or decided and substantially before respondents' motion for attorneys' fees for the appeal was filed in May 1981. Thus, the court of appeals would have been justified in relying on ERISA as amended in 1980 in awarding attorneys' fees for the appeal in this case, if in fact that is what it did.

In neither case is the court of appeals' award of attorneys' fees for the appeal an issue worthy of this Court's review. An award of fees pursuant to the previous provision of ERISA would be correct and, in any case, would constitute a decision of no continuing precedential significance in view of the amendment of that statute in 1980. Similarly, an award of fees pursuant to the 1980 amendments, if that is indeed what the court of appeals did, is also correct.

**D. This Case Bears No Substantial Similarities To *Mullins v. Kaiser Steel Corp.* That Would Warrant The Grant Of Certiorari Or Deferral Of This Petition To Await The Disposition Of That Case.**

Petitioners devote almost as much attention to *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302 (D.C. Cir. 1980), *cert. granted*, 101 S.Ct. 2044 (1981) (No. 80-1345), as they do to the decision sought to be reviewed here. This is not surprising in view of the strength of the lower court opinions in this case, and the mundane nature of the issues presented in this petition. Petitioners' attempt to enhance the Court's interest in this case by analogies to *Mullins* cannot withstand examination, however.

Petitioners' attempt to equate the district court's decision not to entertain their allegations of structural deficiencies in the SASMI Trust Fund to the *Mullins* decision not to consider challenges to the specific provision of the collective bargaining agreement that was to be enforced in that litigation is in error. According to Judge Wilkey's dissenting opinion in *Mullins*, the court in that case either had to find the challenged clause to be legal in order to enforce it or to assume or find that clause to be illegal and nonetheless enforce it for other reasons. 642 F.2d at 1322. In this case, by contrast, the petitioners' challenge to the SASMI trustee selection provision was, to state the matter generously, a collateral issue at best. Thus, petitioners' attempt to tie this case to *Mullins* is in error.

Petitioners' attempt to analogize the attorneys' fee award here with that of *Mullins* is equally misplaced. The *Mullins* case was brought both under ERISA and LMRA, *see* 642 F.2d at 1320, and the dissenting judge at least felt that *Mullins* was more an action to enforce a collective bargaining agreement than to enforce a plan or an ERISA provision. 642 F.2d at 1335. This case, by contrast, was one brought only pursuant to ERISA to enforce a specific plan contribution obligation made applicable through collective bargaining, and the validity of respondents' reliance on ERISA jurisdiction was never

challenged below. See notes 9 and 10, *supra*, and accompanying text. Attorneys' fees have long been awarded in such actions, *see, e.g., Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); *Central States Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 492 F. Supp. 906, 909 (E.D. Mich. 1980), and such awards are essential to enable ERISA trust funds to collect agreed-upon contributions without impairing their soundness and solvency in the process. Moreover, effective September 26, 1980, Congress has specifically provided for attorneys' fees in suits such as this brought by trust funds under ERISA to enforce specific plan contribution obligations made applicable through collective bargaining. Section 502(g) of ERISA, as amended, 29 U.S.C. § 1132(g) (1980). Thus, the ERISA attorneys' fee question has no current significance.

*Mullins* thus makes this case no more worthy of review than it is standing alone. The issues sought to be presented here are distinct from those under review in *Mullins*, and this petition should neither be granted because of *Mullins* nor held to await its disposition.

## III. CONCLUSION

For the reasons stated, respondents respectfully urge that the instant petition be denied.

Respectfully submitted,

HARRY HUGE
DAVID R. BOYD
EUGENE J. COMEY
KRISTA M. FOGLEMAN
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464
*Counsel for Respondents*

Date: December 18, 1981

# APPENDIX

## APPENDIX

## AGREEMENT AND DECLARATION OF TRUST ESTABLISHING THE NATIONAL STABILIZATION AGREEMENT OF SHEET METAL INDUSTRY TRUST FUND

THIS AGREEMENT AND DECLARATION OF TRUST is made and entered into as of the —— day of ————————, 19——, in the City of Washington, District of Columbia, by and between the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO (hereinafter referred to as the "International Union") and various EMPLOYERS (hereinafter referred to as "Employers") in the Sheet Metal Industry who are or may become parties to this Agreement as hereinafter defined.

WITNESSETH:

WHEREAS, various Local Unions of the International Union and Employers have entered into or expect to enter into collective bargaining agreements which provide, among other things, for the establishment of a National Stabilization Agreement of Sheet Metal Industry Trust Fund and prescribe the contributions or payments to be made by the Employers to such Fund, and

WHEREAS, to accomplish the aforesaid purpose, it is desired to establish a National Stabilization Agreement of Sheet Metal Industry Fund as a Trust Fund for receiving contributions and providing benefits for eligible employees, and

WHEREAS, the said Trust Fund is to be known as the "National Stabilization Agreement of Sheet Metal Industry Trust Fund", hereinafter referred to as "National SASMI Fund," and

WHEREAS, it is desired to set forth the terms and conditions under which the said Fund is to be established and administered and,

WHEREAS, it has been mutually agreed that the Fund shall be administered by Trustees and it is desired to define the powers and duties of the Trustees and the nature of benefits to be provided.

NOW THEREFORE, in consideration of the premises, it is mutually understood and agreed as follows:

## ARTICLE I

### Definitions

Unless the context or subject matter otherwise requires, the following definitions shall govern in this Agreement:

Section 1. EMPLOYERS. The term "Employers" as used herein shall mean any Employer in the Sheet Metal Industry who now or hereafter has or is operating under a collective bargaining agreement with a Local Union requiring periodic contributions to the National SASMI Fund created by this Trust Agreement and any amendments or modifications thereof; provided, however, that no employer may be eligible for initial or continued participation in the National SASMI Fund unless it is a party to the Standard Form of Union Agreement, and provided further that in the opinion and at the sole discretion of the Trustees, it is not a party to, or operating under, a Collective Bargaining Agreement which contains featherbedding clauses, restrictive work rules, excessive unfunded travel time provisions, or other terms or conditions which are so uneconomic or unstabilizing by their very nature that they may lead to or create unfavorable prospects for employment for sheet metal workers in the area.

Section 2. EMPLOYEES. The term "Employees" as used herein shall mean all building and construction trade employees covered by collective bargaining agreements between the Employers and the Local Union.

Section 3. UNION OR INTERNATIONAL UNION. The term "Union" or "International Union" as used herein shall mean the Sheet Metal Workers' International Association, AFL-CIO.

Section 4. LOCAL UNION. The term "Local Union" as used herein shall mean any local union affiliated with the International Union, provided, however, that no local union may be eligible for initial or continued participation in the National SASMI Fund unless the Collective Bargaining Agreement to which it is a party or under which it is operating is the Standard Form of Union Agreement, and provided further that in the opinion and at the discretion of the Trustees, it is not a party to, or operating under, a Collective Bargaining Agreement which contains featherbedding clauses, restrictive work rules, excessive unfunded travel time provisions, or other terms or conditions which are so uneconomic or unstabilizing by their very nature that they may lead to or create unfavorable prospects for employment for sheet metal workers in the area.

Section 5. SHEET METAL INDUSTRY. The term "Sheet Metal Industry" as used herein shall mean any and all types of work performed by employees of employers who are or may become covered by or party to collective bargaining agreements with the International Union or any Local Union of the International Union.

Section 6. TRUSTEES.

(a) The term "Employer Trustees" as used herein shall mean the Trustees appointed by the Employers.

(b) The term "Union Trustees" as used herein shall mean the Trustees appointed by the International Union.

(c) The term "Trustees" as used herein shall mean the Employers Trustees and the Union Trustees collectively, and shall include their successors when acting as Trustees.

Section 7. AGREEMENT AND DECLARATION OF TRUST. The term "Agreement and Declaration of Trust" as used herein shall mean this instrument, including any amendments hereto and modifications hereof.

Section 8. PLAN. The term "Plan" as used herein shall mean a plan of benefits or a variety of plans of benefits within a single plan to be established by the Trustees pursuant to this Agreement and Declaration of Trust.

Section 9. FUND. The term "Fund" or "Trust Fund" as used herein shall mean the National SASMI Fund, the Trust Fund created pursuant to this Agreement, and shall mean generally the monies or other things of value which comprise the corpus and additions to the Trust Fund.

Section 10. CONTRIBUTIONS. The term "Contributions" as used herein shall mean the contributions made by Employers to the Fund.

Section 11. BENEFITS. The term "Benefits" as used herein shall mean the benefits to be provided under the Plan to be established by the Trustees and such Plan shall be officially named the "National Stabilization Agreement of Sheet Metal Industry Plan" (hereinafter also referred to as "National SASMI Plan").

Section 12. COLLECTIVE BARGAINING AGREEMENTS. The term "Collective Bargaining Agreements" as used herein shall mean the Collective Bargaining Agreements in force and effect between the Local Unions and the Employers.

## ARTICLE II

### Creation of the National SASMI Fund

Section 1. ESTABLISHMENT OF FUND. There is hereby established the National SASMI Fund to be used for the purposes set forth in this Agreement and Declaration of Trust.

Section 2. GENERAL PURPOSE. The Trust Fund may be a single Fund or several sub-Funds within a single Fund, as the Trustees may deem advisable, and shall be used for purposes of providing, either on an insured or self-insured basis, Benefits as permitted under, but not necessarily limited by, either or both Section 501(c)(9) or Section 501(c)(17) of the Internal Revenue Code of 1954, as now in effect or as hereafter amended, and as permitted under government rules and regulations pertaining to the afore-stated Sections, as decided by the Trustees, and shall further provide the means of financing the expenses of the Trustees and the operation and administration of the Fund in accordance with this Agreement and Declaration of Trust.

## ARTICLE III

### Trustees

Section 1. UNION AND EMPLOYER TRUSTEES. The operation and administration of the Fund shall be the joint responsibility of ——— Trustees appointed by the Employers and ——— Trustees appointed by the International Union. The number of Trustees may be changed from time to time but there shall always be an equal number of Employer and Union Trustees.

Section 2. TRUSTEES. The Trustees shall be:

(a) Union Trustees:

| | |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

(b) Employer Trustees:

| | |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

Section 3. ACCEPTANCE OF TRUSTEESHIP. The Trustees shall immediately meet and sign this Agreement and Declaration of Trust which establishes the Fund. The Trustees, by affixing their signatures at the end of this Agreement and Declaration of Trust, agree to accept the trusteeship and act in their capacity strictly in accordance with the provisions of this Agreement and Declaration of Trust.

Section 4. TERM OF TRUSTEES. Each Trustee above named, and each successor Trustee, shall continue to serve as such until his death, incapacity, resignation, or removal as herein provided. Employer Trustees may be removed and replaced at will by a majority of the then Employer Trustees and Union Trustees may be removed and replaced at will by the General President of the International Union.

Section 5. FORM OF NOTIFICATION. In case a Union Trustee shall be removed, replaced, or succeeded, a statement in writing by the Secretary-Treasurer of said International Union shall be sufficient written evidence of the action taken by the General President of the Interna-

tional Union; a statement in writing signed by a majority of the then remaining Employer Trustees shall be deemed sufficient evidence of any action taken with respect to the removal or replacement of an Employer Trustee. Any resignation by a Trustee shall be by Certified or Registered Mail addressed to the Office of the Fund.

Section 6. DESIGNATION OF EMPLOYER TRUSTEES BY EMPLOYER PARTIES. Any Employer who is or may become a party to this Agreement and Declaration of Trust agrees irrevocably to designate as its representative in the operation and administration of the Fund such Trustees as are named in said Agreement and Declaration of Trust as Employer Trustees, together with their successors selected in the manner provided herein, and agrees to be bound by all the actions taken by the said Employer Trustees pursuant to this Agreement and Declaration of Trust.

## ARTICLE IV

### Powers, Duties, and Obligations of Trustees

Section 1. PROPERTY AND STAFF. The Trustees are authorized and empowered to lease or purchase such premises, materials, supplies and equipment, and to hire and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical and other assistants or employees as in their discretion they may find necessary or appropriate in the performance of their duties.

Section 2. CONSTRUCTION OF AGREEMENT. The Trustees shall have power to construe the provisions of this Agreement and Declaration of Trust and the terms used herein and any construction adopted by the Trustees in good faith shall be binding upon the International Union, the Local Unions, the Employers and the Employees and their families and dependents.

Section 3. GENERAL POWERS. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

(a) To establish and administer a single Plan containing a uniform plan of benefits on behalf of all Employees referred to in this instrument, or a single Plan containing a variety of plans of benefits not necessarily uniform in structure or specifications on behalf of different groups of Employees, such plans of benefits being appropriate to Contributions made by Employers or other criteria such as rates of unemployment and geographical situs of Employees of an Employer.

(b) To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Trust Fund and to do all acts as they, in their discretion, may deem appropriate, necessary or advisable.

(c) To compromise, settle, arbitrate and release claims or demands in favor of or against the Trust Fund or the Trustees on such terms and conditions as the Trustees may deem advisable.

(d) To establish and accumulate as part of the Trust Fund a reserve or reserves, adequate, in the opinion of the Trustees, to carry out the purposes of such Trust.

(e) To pay out of the Fund all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Fund or any money, property or securities forming a part thereof.

(f) To receive contributions or payments from any source whatsoever to the extent permitted by law.

(g) To make appropriate allocations of administrative expenses and disbursements on behalf of or for purposes of the Plan.

(h) To invest and reinvest the corpus of the Fund in any type of investments and to take any and all actions with respect to holding, buying, selling or maintaining such investments as they, in their sole discretion, may deem appropriate.

(i) In their discretion and to the extent they deem it wise, beneficial or necessary to appoint a bank or banks or trust company or trust companies to be designated individually or collectively as "Corporate Trustee," and to enter into and execute a trust agreement or agreements with such Corporate Trustee, to provide for the investment and reinvestment of all or a part of the assets of the Fund, with such other provisions incorporated therein as may be deemed desirable in the Trustees' sole discretion for the proper management of the Fund and upon such execution to convey and transfer to such Corporate Trustee any assets of the Fund. The Trustees shall be forever released and discharged from any responsibility or liability with respect to any assets which they may convey to such Corporate Trustee.

(j) In their discretion and to the extent they may deem it wise, to select any qualified person, firm, or corporation as Investment agent to act for them in the investment or reinvestment of assets of the Fund or advise them with respect thereto and to execute an agreement or agreements for such purpose with such other provisions incorporated therein as may be desirable in the Trustees' sole discretion for the proper management of the Fund.

(k) To do all acts which the Trustees may deem necessary or proper for the protection of the property held hereunder.

(l) To establish an escrow bank account or accounts to the extent deemed necessary in their discretion pending adoption of a Plan.

(m) To do all acts, whether or not expressly authorized herein, which the Trustee may deem necessary to accomplish the general objective of enabling the Employees to obtain Benefits in an efficient and economical manner.

(n) To perform or delegate to others the duties conferred upon them by this Agreement and Declaration of Trust.

Section 4. COMPENSATION. The Union and Employer Trustees shall not receive compensation for the performance of their duties.

Section 5. PERSONAL LIABILITY. Neither the Trustees nor any individual or successor Trustee shall be personally answerable or personally liable for any liabilities or debts of the Fund contracted by them as such Trustees, or for the nonfulfillment of contracts, but the same shall be paid out of the Fund and the Fund is hereby charged with a first lien in favor of such Trustees for his or their security and indemnification for any amounts paid out by any such Trustee for any liability and for his and their security and indemnification against any liability of any kind which the Trustees or any of them may incur hereunder; provided, however, that nothing herein shall exempt any Trustee from liability arising out of his own willful misconduct, bad faith or gross negligence, or entitle such Trustee to indemnification for any amounts paid or incurred as a result thereof.

Neither the Trustees nor any individual or successor Trustee shall be liable for any error of judgment or for any loss arising out of any act of commission or omission in the execution of his or their duties so long as he or they shall act in good faith and without willful misconduct or gross negligence.

The Trustees shall be fully protected in acting upon any instrument, certificate, or paper believed by them to be genuine and to be signed or presented by the proper person or persons, and shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing, but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.

Neither the Employers, the International Union nor the Local Union shall in any way be liable in any respect for any of the acts, omissions or obligations of the Trustees, individually or collectively.

The Trustees may from time to time consult with the Trust Fund's legal counsel and shall be fully protected in acting upon advice of counsel.

Section 6. BOOKS OF ACCOUNT. The Trustees shall keep true and accurate books of account and records of all their transactions, which shall be audited annually or more often by a certified public accountant selected by the Trustees. Such audits shall be available for inspection by the International Union, the Local Unions and the Employers at the principal office of the Fund.

Section 7. EXECUTION OF DOCUMENTS. The Trustees may authorize an Employer Trustee and a Union Trustee or any joint group equally composed of Employer and Union Trustees to jointly execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereupon that such notice or instrument has been duly authorized and is binding on the Fund and the Trustees.

Section 8. DEPOSIT AND WITHDRAWAL OF FUNDS. All monies received by the Trustees hereunder shall be deposited by them in such bank or banks as the Trustees may designate for that purpose and all withdrawals of monies from such account or accounts shall be made only by checks signed by the Trustees authorized

in writing by the Trustees to sign such checks. No check shall be valid unless signed by two persons of whom one shall be a Union Trustee and one an Employer Trustee, except that the Trustees may, in their discretion, designate and authorize an employee of the Trust to sign checks upon such separate and specific bank account or bank accounts as the Trustees may designate and establish for such purpose.

The Employer Trustees shall designate in writing the names of the particular Employer Trustees who may sign checks in the above manner, and the Union Trustees shall likewise designate in writing the names of the particular Union Trustees who may sign checks in the above manner.

Section 9. SURETY BONDS. The Trustees and any employees of the Trustees who are empowered and authorized to sign checks as aforesaid shall be bonded by a duly authorized surety company in such amounts as may be determined from time to time by the Trustees. Each such employee employed by the Trustees who may be engaged in handling monies of the Trust Fund shall also be bonded by a fully authorized surety company in the same manner. The cost of the premium on such bonds shall be paid out of the Fund.

## ARTICLE V

### Contributions to the Fund

Section 1. RATE OF CONTRIBUTIONS. In order to effectuate the purposes hereof, each Employer shall contribute to the Fund the amount required by the Collective Bargaining Agreement between the Local Union and the Employer. The rate of contribution shall at all times be governed by the aforesaid Collective Bargaining Agreement then in force and effect.

Section 2. EFFECTIVE DATE OF CONTRIBUTIONS. All contributions shall be made effective as re-

quired by the Collective Bargaining Agreement and shall continue to be paid as long as the Employer is so obligated pursuant to the Collective Bargaining Agreement with the Local Union or until he ceases to be an Employer within the meaning of this Agreement and Declaration of Trust as hereinafter provided.

Section 3. MODE OF PAYMENT. All contributions shall be payable to the National SASMI Fund and shall be paid in the manner and form determined by the Trustees.

Section 4. DEFAULT IN PAYMENT. The Trustees may take any action necessary to enforce payment of the contributions due hereunder, including but not limited to, proceedings at law and equity. Nonpayment by an Employer of any contributions when due shall not relieve any other Employer of his obligation to make payments. In addition to any other remedies to which the parties may be entitled, an Employer in default for ten (10) days may be required at the discretion of the Trustees to pay interest at the rate specified for an Employer under his collective bargaining agreement with respect to delinquent payments into other fringe benefit funds or, at the option of the Trustees, at a higher rate up to the highest rate of interest permissible under the law of the state in which the delinquent Employer is located, from the date when the payment was due to the date when payment is made, together with all expenses of collection incurred by the Trustees, including but not limited to counsel fees.

Section 5. REPORT ON CONTRIBUTIONS. The Employers shall make all reports on contributions required by the Trustees. The Trustees may at any time have an audit made by independent certified public accountants of the payroll and wage records of any Employer in connection with the said contributions and/or reports.

## ARTICLE VI

### Plan of Benefits

Section 1. BENEFITS. The Trustees shall have full authority to determine the specifications of a plan or plans of benefits appropriate to Employees of an Employer, and to determine all questions of nature, amount and duration of Benefits to be provided based on what it is estimated the Contributions by an Employer and the Fund can provide without undue depletion or excessive accumulation after taking into consideration rates of unemployment, geographical location of Employees or other criteria.

Section 2. RECIPIENTS OF BENEFITS. Benefits may be provided in accordance with Section 1 of this Article for any Employee of a contributing Employer.

Section 3. ELIGIBILITY REQUIREMENTS FOR BENEFITS. The Trustees shall have full authority to determine eligibility requirements for Benefits and to adopt rules and regulations setting forth same which shall be binding on the Employees.

Section 4. METHOD OF PROVIDING BENEFITS. The Benefits shall be provided and maintained by such means as the Trustees shall in their sole discretion determine.

Section 5. WRITTEN PLAN OF BENEFITS. The initial Plan, containing the detailed basis for eligibility, amount and payment of Benefits, and all other provisions, is attached hereto as Exhibit I, and shall be adopted by the Trustees by appropriate resolutions of the Trustees, and, thereafter, may be changed or modified by the Trustees from time to time as they in their sole discretion may determine. All such changes or modifications shall similarly be specified in writing by appropriate resolutions of the Trustees.

Section 6. GOVERNMENTAL RULINGS. The Plan set forth in Exhibit I to be adopted by the Trustees to the extent possible shall:

(a) Not have an adverse effect on the Fund's qualification for exemption from Federal income tax under either Section 501(c)(9) or Section 501(c)(17) of the Internal Revenue Code.

(b) Qualify Employer Contributions to the Fund as currently deductible expenses under the Internal Revenue Code.

(c) Avoid Employer Contributions to the Fund and Benefits paid out of the Fund being treated as "wages" for purposes of the Federal Unemployment Tax, and the Federal Insurance Contribution Act Tax, or Collection of Income Tax at Source of Wages, under Subtitle C of the Internal Revenue Code.

(d) Prevent any part of Employer Contributions or any Benefits paid being included for purposes of the Fair Labor Standards Act in the regular rate of any Employee.

The Trustees are authorized to make modifications in Exhibit I for the purpose of attempting to secure from the appropriate agencies the approvals and rulings to effect the foregoing.

## ARTICLE VII

### Meetings and Decisions of Trustees

Section 1. OFFICERS OF TRUSTEES. The Trustees shall meet as promptly as possible after the execution of this Agreement and Declaration of Trust and elect a Chairman and a Secretary from among the Trustees. When the Chairman is an Employer Trustee, the Secretary shall be a Union Trustee, and vice versa. The terms of such officers shall commence on the date of election

and continue until his or their death, incapacity, resignation, or removal as herein provided.

Section 2. MEETINGS OF TRUSTEES. The Trustees shall meet not less than twice a year at such place or places as may be agreed upon by the Chairman and Secretary, and shall be called by the said officers upon ten (10) days' written notice to the other Trustees. There shall be no meeting unless a quorum is present. At all meetings the Employer Trustees and the Union Trustees, respectively, shall have equal collective voting strength.

Section 3. ACTION BY TRUSTEES WITHOUT MEETING. Action by the Trustees may also be taken by them in writing without a meeting, provided, however, that in such cases there shall be written concurrence by a majority of all of the Trustees.

Section 4. QUORUM. In all meetings of the Trustees, four (4) Trustees shall constitute a quorum, for the transaction of business providing there are at least two (2) Employer Trustees and two (2) Union Trustees present at the meeting.

Section 5. ACTION BY TRUSTEES AT MEETINGS. Except as provided in Section 3 of this Article, all action by the Trustees at meetings shall be by majority of the votes cast by the Trustees. In the event any matter presented for decision relating to (a) the administration of the Trust Fund, (b) the distribution of monies or assets of the Trust Fund or (c) any other matter relating to this Agreement but excluding amendments to the Agreement or to the Plan adopted pursuant thereto, cannot be decided because of a tie vote, the matter may then be submitted to arbitration as hereinafter provided.

Section 6. MINUTES OF MEETINGS. The Secretary shall keep minutes of all meetings but such minutes need not be verbatim. Copies of the minutes shall be sent to all Trustees.

## ARTICLE VIII

### Arbitration

Section 1. SELECTION OF PERMANENT IMPARTIAL UMPIRE. The Trustees shall select a permanent impartial umpire to break deadlocks arising out of matters covered under Article VII, Section 5, herein, who shall serve in such capacity until removed by the Trustees. In the event of failure or refusal of the Trustees to appoint a permanent impartial umpire within ninety (90) days after restablishment of this Trust Fund, any of the Trustees may petition the United States District Court for the District of Columbia for appointment of an individual to act in such capacity, who shall serve in such capacity until removed by the Trustees.

Section 2. WHEN APPLICABLE. A matter arising under Article VII, Section 5, over which the Trustees have deadlocked may be submitted to the permanent impartial impire for resolution by any Trustee within thirty (30) days after the deadlock has occurred. The submission which shall be in writing shall set forth the matter over which the Trustees have deadlocked and shall be served on the permanent impartial umpire and each of the Trustees by Certified or Registered Mail. The permanent impartial umpire shall hold a hearing within (20) days after receipt of the submission and shall issue a decision as promptly as possible thereafter. His decision shall be final and binding on the Trustees and all parties interested in the matter or issue resolved.

Section 3. EXPENSES OF ARBITRATION. The cost and expense incidental to any arbitration proceeding shall be a proper charge against the Fund.

## ARTICLE IX

### Execution of Trust Agreement

Section 1. WRITTEN INSTRUMENTS. Subject to the conditions in Article I, Section 1 herein, an Employer may become, and/or remain a party to this Trust Agreement upon executing such written instruments as the Trustees may, from time to time, prescribe. Acceptance of such Employer by the Trustees shall be evidenced in writing by the Trustees.

Section 2. BINDING EFFECT. This Trust Agreement, upon execution, shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event that the Employer sells, leases or transfers his or its company or part thereof, or it is taken over by assignment, receivership, or bankruptcy proceedings, the successor shall be bound by the terms and conditions of this Agreement. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, leasee, assignee, or other successor in interest. Such notice shall be in writing with a copy to the Trustees not later than four (4) days after the effective date of such transaction. The Employer agrees that its failure to so notify its successor will operate to continue its obligations under this Agreement.

## ARTICLE X

### Amendment to Trust Agreement

Section 1. AMENDMENT BY TRUSTEES. This Agreement and Declaration of Trust may be amended from time to time by the Trustees provided that each amendment shall be duly executed in writing by the Trustees and annexed hereto.

Section 2. NOTIFICATION OF AMENDMENT. Whenever an amendment is adopted in accordance with this Article, a copy thereof shall be distributed to all

Trustees, and the Trustees shall so notify all necessary parties and shall execute any instrument or instruments necessary in connection therewith.

## ARTICLE XI

### Termination of Trust

Section 1. BY THE TRUSTEES. This Agreement and Declaration of Trust may be terminated by an instrument in writing executed by all of the Trustees.

Section 2. PROCEDURE ON TERMINATION. In the event of the termination of this Agreement and Declaration of Trust, the Trustees shall apply the Fund to pay or to provide for the payment of any and all obligations of the Fund and shall distribute and apply any remaining surplus in such manner as will in their opinion best effectuate the purposes of the Fund; provided, however, that no part of the corpus or income of said Fund shall be used for or diverted to purposes other than for the exclusive benefit of the Employees, their families, beneficiaries, or dependents or the administrative expenses of the Fund or for other payments in accordance with the provisions of the Fund. Under no circumstances shall any portion of the corpus or income of the Fund, directly or indirectly, revert or accrue to the benefit of any contributing Employer, a Local Union or the International Union.

Section 3. NOTIFICATION OF TERMINATION. Upon termination of the Fund in accordance with this Article, the Trustees shall forthwith notify each Local Union and each Employer and also all other necessary parties, and the Trustees shall continue as Trustees for the purpose of winding up the affairs of the Trust.

## ARTICLE XII

### Miscellaneous Provisions

Section 1. TERMINATION OF INDIVIDUAL EMPLOYERS. An Employer shall cease to be an Employer within the meaning of this Agreement when he is no longer obligated, pursuant to a Collective Bargaining Agreement with a Local Union, to make contributions to this Fund or, at the option of the Trustees, may cease to be an Employer within the meaning of this Agreement, when he is delinquent in his contributions or reports to the Fund.

Section 2. VESTED RIGHTS. No Employee or any person claiming by or through such Employee including his family, dependents, beneficiary and/or estate, shall have any right, title or interest in or to the Fund or any property of the Fund or any part thereof except as may be specifically provided in the Plan or determined by the Trustees.

Section 3. ENCUMBRANCE OF BENEFITS. No monies, property, or equity, of any nature whatsoever, in the Fund, or policies or benefits or monies payable therefrom, shall be subject in any manner by any Employee or person claiming through such Employee to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. SITUS. The City of Washington, District of Columbia, shall be deemed the situs of the Trust Fund created hereunder. All questions pertaining to validity, construction and administration shall be determined in accordance with the laws of the State of New York.

Section 5. CONSTRUCTION OF TERMS. Wherever any words are used in this Agreement in the masculine gender they shall be constructed as though they were

used in the feminine or neuter gender in all situations where they would so apply, and wherever any words are used in this Agreement in the singular form they shall be construed as though they were also used in the plural form in all situations where they would so apply, and wherever any words are used in this Agreement in the plural form they shall be construed as though they were also used in the singular form in all situations where they would so apply.

Section 6. CERTIFICATION OF TRUSTEES' ACTIONS. When the Chairman and the Secretary execute any certificate or document on behalf of the Trustees, such action shall be deemed execution by all the Trustees; and all persons having dealings with the Fund or with the Trustees shall be fully protected in reliance placed on such duly executed document.

Section 7. NOTIFICATION TO TRUSTEES. The address of each of the Trustees shall be presumed to be that stated on the signature page of this Agreement. Any change of address shall be effected by written notice to the Trustees.

Section 8. SEVERABILITY. Should any provision in this Trust Agreement or in the Plan or rules and regulations adopted thereunder or in any Collective Bargaining Agreement be deemed or held to be unlawful or invalid for any reason, such fact shall not adversely affect the provisions herein and therein contained unless such illegality shall make impossible or impractical the functioning of the Trust and the Plan, and in such case the appropriate parties shall immediately adopt new provisions to take the place of the illegal or invalid provisions.

Section 9. EXPENSES OF TRUSTEES. All expenses incurred by the Trustees in the performance of their duties shall be chargeable to the Fund.

We, the undersigned, do hereby agree to serve as Trustees in accordance with said Trust Agreement. We have read the said Trust Agreement, fully understand the contents thereof and agree to comply with all its terms and provisions.

FOR UNION:

Name ———————————

Position: ———————————

Address: ———————————

FOR EMPLOYERS:

Name ———————————

Position: ———————————

Address: ———————————

# Petitioner's Reply Brief

No. 81-941

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

D. W. BROWNING CONTRACTING CO., TOM CLEMENTS, INC., E. C. GOLDMAN, INC., LAPIN SHEET METAL, R & R INDUSTRIES, INC., and VON-AIRE, INC.,

*Petitioners,*

*vs.*

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, ET AL.,

*Respondents.*

## PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FOR THE DISTRICT OF COLUMBIA CIRCUIT

GERARD C. SMETANA
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, Ill. 60603
(312) 346-4515
*Counsel for Petitioners*

Of Counsel:
KOVAR & SMETANA
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, Ill. 60603

Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Pandick Press Midwest, Inc., Chicago • 454-7600

## TABLE OF CASES

AMAX Coal Co. v, NLRB,
___ U.S. ___ 101 S.Ct. 2789,
69 L.Ed. 2d 672 (1981) ..... 9

Fusari v. Steinberg,
419 U.S. 379 (1975) ..... 9

Mobile Mechanical Contractors Association, Inc.
v. Carlough, 382 F.Supp. 1134
[S.D. Ala. 1974] .....3

Mobile Mechanical Contractors Association, Inc.
v. Carlough, et al., 456 F.
Supp. 310 (1978); 556 F.2d 1213,
(1977), rehearing denied Jan. 30,
1978) ..... .....2, 3, 4, 8

Mullins v. Kaiser Steel Corp.,
642 F.2d 1302 (D.C. Cir. 1980),
cert. granted, 49 U.S. L.W. 3824
(May 4, 1981), No. 80-1345 .....10

Sheet Metal Workers International Assoc., 234 NLRB 1238 ....3, 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-941

---

D. W. BROWNING CONTRACTING CO., TOM CLEMENTS, INC., E. C. GOLDMAN, INC., LAPIN SHEET METAL, R & R INDUSTRIES, INC., and VON-AIRE, INC.,

Petitioners,

v.

NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, ET AL.,

Respondents.

---

# PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

D. W. Browning Contracting Co., Tom Clements, Inc., E. C. Goldman, Inc., Lapin Sheet Metal, R & R Industries, Inc. and Von-Aire, Inc. ("Petitioners") six small sheet metal contractors, members of the Central Florida Sheet Metal Contractors Association, respectfully reply to Respondents' Brief In Opposition. Petitioners respectfully

suggest, contrary to Respondents' contention that this is a simple collection case under ERISA not worthy of the Court's time, that the Court is presented with the important question of whether a Federal Court can refuse to consider a defense of illegality when the identical Trust was held illegal by another Federal Court [1] .

Petitioners, contrary to the suggestion of Respondents did not simply breach their obligations to make payments into the Trust Funds but rather accepted SASMI after a long coercive

[1] It has been Petitioners' contention since the SASMI Trust was initially formed that it did not comply with the strict provisions of Section 302(c)(5). The history of the illegal efforts by the Union's International President, Edward J. Carlough, one of the Respondents herein, together with the International Sheet Metal Workers Union, to foist SASMI through coercive action upon sheet metal contractors throughout the United States is fully documented in the decision of Judge Hand finding the SASMI Trust to be illegal under Section 302(c)(5). Mobile Mechanical Contractors Association, Inc. v. Carlough, 456 F. Supp. 310 (1978).

strike (see Sheet Metal Workers International Assoc., 234 NLRB 1238) and immediately thereafter filed charges with the National Labor Relations Board contesting the illegality of the strike and SASMI[2].

Those charges resulted in the

[2] At the time that the initial challenge to SASMI was made by the Central Florida Sheet Metal Contractors Association ("CFSMCA"), of which Petitioners are each members, the charges were consolidated with similar charges filed by the Mobile Mechanical Contractors Association ("MMCA"), who settled their unfair labor practice charges with the union. The MMCA did not capitulate to the Union's coercive pressure but rather obtained injunctive relief under Section 302 (Mobile Mechanical Contractors Assoc. v. Carlough, 382 F. Supp. 1134 [S.D. Ala. 1974]). Subsequent to that injunctive relief, their unfair labor practice case was settled and the District Court determined in a well reasoned opinion, also awarding damages, that SASMI was violative of Section 302(c)(5) (See Mobile Mechanical Contractors Assoc. v. Carlough, et al., 456 F. Supp. 310, only damages appealed, affirmed Dec. 21, 1981 [5th Cir. Unit B] [No. 79-2054]). The cases were again joined in the Fifth Circuit when CFSMCA's appeal from the NLRB's decision was heard in tandem before the same panel as the Union's appeal from Judge Hand's damage award predicated upon his finding of illegality.

issuance of a decision by a National Labor Relations Board Administrative Law Judge finding the coercion to be illegal in reliance upon the first decision of Judge Hand in the MMCA case wherein he found SASMI to be illegal and enjoined picketing to obtain it.

The Sheet Metal Workers Union International appealed the decision of the Administrative Law Judge to the NLRB, which decided that it had no jurisdiction to consider the legality of SASMI because at that point in time there was no outstanding decision of a federal court finding SASMI to be unlawful[3].

[3] Member Penello, one of the three Board Members on the NLRB panel decision, indicated that he would have ruled otherwise had there been an outstanding decision of a federal court finding SASMI to be illegal (Sheet Metal Workers International Assoc., supra). At that point in time, the Fifth Circuit refused to find jurisdiction under § 302(e) that it could declare SASMI illegal and also on rehearing determined that permissible jurisdiction for relief under § 302(e) was limited to prospective injunctive relief. (Mobile Mechanical Contractors Assoc. v. Carlough, 556 F.2d 1213, (1977), rehearing denied Jan. 30, 1978). The Court found the injunctive relief that had been entered against SASMI to be moot.

The District Court Judge in the instant case relied upon the decision of the National Labor Relations Board as authority for the proposition that SASMI was not illegal and herself refused to make a determination of the legality of SASMI on the ostensible equitable considerations that a determination of illegality would have adverse effects on the Fund generally. Contrary to the suggestion of the Respondents in their Opposition, Petitioners fully argued various aspects of the legality of SASMI to the District Court. Petitioners, in their opening brief to the District Court, urged that SASMI as amended nevertheless violated the requirements of Section 302(c)(5). The Amendments to SASMI that Respondents in their Opposition, p. 8, claim to obviate the need for review by the Court were apparently fully considered by the District Court Judge and ruled upon in

her grant of summary judgment in favor of Respondent and against the position of Petitioners.

Petitioners, in their opening brief in the District Court, clearly argued to the Court the invalidity of SASMI as amended stating:

> "Moreover, the issue as to the validity of Article III (the representation provision of SASMI) is not before the NLRB since the unlawful procurement of SASMI from the answering Defendants occurred before the provision of SASMI was amended in its present form. Thus, even after the disposition of the NLRB case, the issue may well remain unresolved. Accordingly, the Court may hold Article III invalid without impinging upon the jurisdiction of the NLRB."

Pages 12 and 13 of the Memorandum on Points and Authorities.

The quoted portion of the Argument in the District Court demonstrates contrary to the assertions of Respondents not only that amended SASMI has been argued to be illegal since the inception of

this suit but also that Petitioners from the inception have urged concurrent jurisdiction in both the NLRB and the District Court to determine the legality of SASMI. In fact, Petitioners also urged in the District Court that:

> "A finding by this Court that Article III violates Section 302 will dispose of this case since an employer is prohibited from paying monies to a fund that does not strictly conform to that Section." [Citing cases].

It is important to note, however, that the Amendments to SASMI were limited to the equal representation objections that had been found to be contrary to Section 302(c)(5) and the National Labor Relations Act by the Administrative Law Judge in the CFSMCA case, and that it was the position of the Petitioners in the District Court that, notwithstanding these Amendments, the equal representation requirements of

§ 302(c)(5) were still not met. More importantly, the illegality of SASMI, that has not been addressed by the District Court or the Court of Appeals in the instant case, deals with the illegal trust purpose of the entire SASMI Fund.

The Petitioners' problem has recently been compounded by the decision of the Fifth Circuit similarly refusing to consider the illegality of SASMI and to that extent affirming the decision of the NLRB (See Appendix A attached.) That decision ignores the determination of Judge Hand in the companion Mobile Mechanical Contractors, 456 F. Supp. 310 (1978), case finding SASMI to be illegal where the question of liability was not appealed and affirms the Board by simply stating that, at the time of the Board's decision, there was no prior court decision finding SASMI to be unlawful. This violates a fundamental rule that a court must apply the law

the existing at the time it makes its decision. Fusari v. Steinberg, 419 U.S. 379 (1975). The refusal of the Court of Appeals to remand the case to the Board is likewise erroneous because if the Board would review the SASMI decision today, there would be an outstanding decision of illegality and under its standard, it must reach a different conclusion [4] .

[4] A rehearing petition will be filed from the Fifth Circuit decision on this aspect of the case as well as certain key differences in the union's overt acts in creating SASMI and requiring within the SASMI Trust that participants in the Fund may only agree to the standard form of union agreement (See Article I, Section 1, of Respondents' Appendix to Opposition at p. 2a.) It will be urged on rehearing that this kind of interference by a Fund in the collective bargaining process ought to be an exception to this Court's decision in AMAX Coal Co. v. NLRB, ___ U.S. ___ 101 S. Ct. 2789, 69 L.Ed. 2d 672 (1981) consistent with the concerns articulated in the dissent by Justice Stevens.

Finally, contrary to the assertions of the Respondents, the actions of the Court of Appeals in refusing to consider the legality of SASMI is the identical omission that the Court is reviewing in Mullins v. Kaiser Steel Corp., 642 F.2d 1302 (D.C. Cir. 1980), cert. granted, 49 U.S. L.W. 3824 (May 4, 1981, No. 80-1345.

Should the forum of the NLRB for considering the legality of SASMI now be finally precluded, the only remaining avenue for Petitioners to obtain a meaningful decision on the legality of SASMI is in the instant petition. The filing of a new action under Section 302(e) as suggested by the Court of Appeals would not only require the institution of yet another law suit but would in fact not alleviate Petitioners' present liability because Section 302(e) only affords prospective relief.

## CONCLUSION

For the reasons heretofore stated, the Petition for Certiorari should be granted.

Respectfully submitted,

Gerard C. Smetana
500 Marquette Building
140 S. Dearborn St.
Chicago, Ill. 60603
(312) 346-4515

Counsel for Petitioners

Of Counsel:

KOVAR & SMETANA
500 Marquette Bldg.
140 S. Dearborn St.
Chicago, Ill. 60603

Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Dated: January 7, 1982

**CENTRAL FLORIDA SHEET METAL CONTRACTORS ASSOCIATION, INC., Petitioner,**

**v.**

**NATIONAL LABOR RELATIONS BOARD, Respondent,**

**Sheet Metal Workers, International Association, AFL-CIO, Edward J. Carlough, and Local 493, Sheet Metal Workers, Intervenors.**

**No. 79-2396.**

United States Court of Appeals,
Fifth Circuit.*
Unit B

Dec. 21, 1981.

Employer association petitioned for review of order of the National Labor Relations Board that union did not commit unfair labor practice by striking to obtain trust fund for benefit of employees. The Court of Appeals, Godbold, Chief Judge, held that: (1) interpretation of section of National Labor Relations Act, that strike by union for trust fund was not refusal to bargain in good faith, was reasonable and Court would defer to Board's interpretation; (2) strike by union to compel employer association to join trust fund for which management trustee had already been chosen did not coerce employer's choice of collective bargaining agent so as to constitute unfair labor practice, notwithstanding that trustee selection process might be invalid; (3) trust fund provision for payment of benefits to "involuntarily underemployed" workers did not authorize trust payments to be made to strikers under guise of involuntary underemployment so as to constitute nonmandatory subject of bargaining and thus evidence did not establish unfair labor practice by union's bargaining to impasse over provision; and (4) record supported determination that sufficient nexus existed between trustee selection mechanism and benefits for employer's selection of trustee to be considered a mandatory subject of bargaining.

Order affirmed.

**1. Labor Relations ⇐675**

When presented with a question of statutory construction of National Labor Relations Act, Court of Appeals defers to interpretation given statute by National Labor Relations Board as agency charged with its enforcement if that interpretation is reasonable and consistent with prior holding. National Labor Relations Act, § 1 et seq. as amended 29 U.S.C.A. § 151 et seq.

**2. Labor Relations ⇐395.1**

Right of employer to be free from economic coercion by union to implement illegal contract term is within realm of protection afforded in section of National Labor Relations Act defining employer and union unfair labor practices. National Labor Relations Act, § 8 as amended 29 U.S.C.A. § 158.

**3. Labor Relations ⇐395.3**

National Labor Relations Board's interpretation of National Labor Relations Act section making it unfair labor practice for union to refuse to bargain collectively with employer representative, that union may bargain to impasse over trust fund that may violate section of Act providing restrictions on financial transac-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1981, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

tions unless court has already determined fund's illegality or illegality is evident on face of documents, and that strike by union for trust fund was therefore not refusal to bargain in good faith, was reasonable and did not frustrate either purpose or enforcement scheme of restriction section; Court of Appeals would thus defer to Board's interpretation. National Labor Relations Act, §§ 8(b)(3), 302 as amended 29 U.S.C.A. §§ 158(b)(3), 186.

4. Labor Relations ⇐612

National Labor Relations Board's cease and desist powers to remedy unfair labor practice cannot cure defects in trust fund but can only enjoin payments and further demands for fund. National Labor Relations Act, § 8(a, b) as amended 29 U.S.C.A. § 158(a, b).

5. Labor Relations ⇐729

A district court can enforce compliance with section of National Labor Relations Act setting forth restrictions on financial transactions by eliminating invalid provisions of trust. National Labor Relations Act, § 302 as amended, 29 U.S.C.A. § 186.

6. Labor Relations ⇐395.1

Strike to compel employer association to join trust fund for which management trustee had already been chosen did not coerce employer's choice of collective bargaining agent so as to constitute unfair labor practice, notwithstanding that trustee selection process might be invalid. National Labor Relations Act, §§ 8(b)(1)(B), 302 as amended 29 U.S.C.A. §§ 158(b)(1)(B), 186.

7. Labor Relations ⇐758

Proper remedy for alleged unequal representation of employer association in mechanism for selection of management trustee of employee trust fund was for employer association to bring action in district court. National Labor Relations Act, §§ 8(b)(1)(B), 302 as amended 29 U.S.C.A. §§ 158(b)(1)(B), 186.

8. Labor Relations ⇐178

A union cannot bargain to impasse for strike benefits because they do not come within scope of wages or other mandatory subjects of bargaining. National Labor Relations Act, § 8(d) as amended 29 U.S.C.A. § 158(d).

9. Labor Relations ⇐1052.1

Payment of strike benefits from employer-funded trust violates section of National Labor Relations Act setting forth restrictions on financial transactions and listing type of permissible payments. National Labor Relations Act, § 302 as amended 29 U.S.C.A. § 186.

10. Labor Relations ⇐395.4

It is appropriate for National Labor Relations Board to look to section of National Labor Relations Act setting forth restrictions on financial transactions as interpretive aid for detecting whether strike benefits are contemplated by trust fund, rendering it a nonmandatory subject of bargaining, but Board need not apply restrictions section's evidentiary standards, which determine when trust fund is invalid for not safeguarding against payment of strike benefits, to unfair labor practice proceedings to determine if union is bargaining for strike benefits, particularly when those standards conflict with established unfair labor practice evidentiary standards. National Labor Relations Act, §§ 8, 302 as amended 29 U.S.C.A. §§ 158, 186.

11. Labor Relations ⇐131.2, 395

Possibility that a trust fund may be used to provide surreptitious strike benefits is sufficient for court to find fund violates section of National Labor Relations Act setting forth restrictions on financial transactions, but is not sufficient basis upon which to premise unfair labor practice. National Labor Relations Act, §§ 8, 302 as amended 29 U.S.C.A. §§ 158, 186.

12. Labor Relations ⇐539

Section of National Labor Relations Act governing unfair labor practices places burden of establishing unfair labor practice on general counsel who must prove actual, not potential violation. National Labor Relations Act, § 8 as amended 29 U.S.C.A. § 158.

13. Labor Relations ⇐578

Although representative of international union told employer association member that funds would be disbursed from employer-funded trust during strike if strike occurred during two annual disbursement periods, in view of evidence that, before making this statement, representative assured member that payment would be made in strictest compliance with federal law, trust fund provision for payment of benefits to "involuntarily underemployed" workers did not provide for trust payments to strikers under guise of involuntary underemployment such as to constitute nonmandatory subject of bargaining, and thus evidence did not establish unfair labor practice by union in bargaining to impasse over provision. National Labor Relations Act, §§ 8(d), 302 as amended 29 U.S.C.A. §§ 158(d), 186.

14. Labor Relations ⇐178

National Labor Relations Board's judgment as to what constitutes a mandatory subject of bargaining is entitled to considerable deference. National Labor Relations Act, § 8(d) as amended 29 U.S.C.A. § 158(d).

15. Labor Relations ⇐178, 555

Record supported National Labor Relations Board's determination that sufficient nexus existed between trustee selection mechanism and benefits such that selection of trustee for employer-funded trust could be considered mandatory subject of bargaining, and such interpretation did not conflict with or fail to accommodate section of National Labor Relations Act setting forth restrictions on financial transactions by permitting union to participate in selection of employer-appointed trustee. National Labor Relations Act, §§ 8, 8(b)(1)(B), (d), 302 as amended 29 U.S.C.A. §§ 158, 158(b)(1)(B), (d), 186.

---

On Petition for Review of an Order of the National Labor Relations Board.

Before GODBOLD, Chief Judge, TUTTLE and HILL, Circuit Judges.

GODBOLD, Chief Judge:

This is another labor dispute concerning union efforts to secure collective bargaining contracts in the sheet metal industry that provide for employer contributions to a trust fund for the benefit of employees. It is decided together with *Mobile Mechanical Contractors Association, Inc. v. Carlough* (No. 79–2054) slip op. p. ——, —— F.2d —— (5th Cir. 1981). We review a decision by the National Labor Relations Board that a union

did not commit an unfair labor practice by striking to obtain the trust fund.

Petitioner, Central Florida Sheet Metal Contractors Association, Inc., is a non-profit Florida corporation that conducts multi-employer collective bargaining on behalf of its employer members. The first contract negotiated by the association with Local 493 of the Sheet Metal Workers International Association expired by its terms July 31, 1974. In early July the association and the local commenced negotiations for a new contract. At the urging of intervenor Sheet Metal Workers International Association ["the international"] and Edward J. Carlough, president of the international, the local insisted upon inclusion in the contract of the National Stabilization Agreement for the Sheet Metal Industry, which provided for a trust fund for the benefit of employees funded by employer contributions.

The association resisted the local's demand, and the local struck. After a month the association surrendered and agreed to a contract containing the trust fund. The union membership ratified the proposed contract and returned to work. The association and the local formally executed a three-year agreement incorporating the trust fund retroactively to August 1, 1974, the date of the strike. Thereafter the association filed unfair labor practice charges that form the basis for this case, alleging that the local, the international and Carlough violated §§ 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(b)(1)(B) and 158(b)(3), by insisting to impasse on incorporation of the trust fund into the contract.[1]

The trust fund was established by the international in 1973 to provide supplemental economic assistance to "under-employed" union members. The Board found that the international's intention was "to achieve a rough approximation in disposable income and fringe benefits between union members who were fully employed and those who were unemployed, due to local economic conditions, for a substantial portion of the year." The trust fund was to be funded by contributions at 3% of total payroll wages from all sheet metal contractors who agreed to incorporate it into their collective bargaining agreements. The Sheet Metal Contractors Association of San Francisco was the first employer association to include the trust fund in a collective bargaining agreement, and, accordingly, it selected the first employer trustee. The portions of the trust fund agreement relevant to this proceeding are set forth in the margin.[2]

1. The association also charged, and the Administrative Law Judge found, that the local, the international and Carlough violated §§ 8(b)(1)(B) and 8(b)(3) by insisting to impasse on incorporation of Article X, § 8 of the international's Standard Form Union Agreement, which provides that in the event the association and the local are unable to reach agreement on the terms of any future contract such terms will be submitted to arbitration by the National Joint Adjustment Board. This board is comprised of representatives of the international and the National Sheet Metal and Air Conditioning Contractors Association, to which the Central Florida association and its employer-members do not belong. This finding is not challenged.

2. Section 1. UNION AND EMPLOYER TRUSTEES. The operation and administration of the fund shall be the joint responsibility of one Trustee appointed by the Employers and one Trustee appointed by the International Union. The number of Trustees may be changed from time to time but there shall always be an equal number of Employer and Union Trustees.

....

Section 4. TERM OF TRUSTEES. Each Trustee above named, and each successor Trus-

The Administrative Law Judge found that the provisions of the trust fund agreement precluded the association from "equal" representation in the administration of the fund, and the trust fund therefore violated § 302 of the Labor Management Relations Act ["LMRA"], 29 U.S.C. § 186.[3] The ALJ looked at other

tee shall continue to serve as such until his death, incapacity, resignation, or removal as herein provided. Employer Trustees may be removed and replaced at will by a majority of the then Employer Trustees and Union Trustees may be removed and replaced at will by the General President of the International Union.

. . . .

Section 6. DESIGNATION OF EMPLOYER TRUSTEES BY EMPLOYER PARTIES. Any Employer who is or may become a party to this Agreement and Declaration of Trust agrees irrevocably to designate as its representative in the operation and administration of the Fund such Trustees as are named in said Agreement and Designation of Trust as Employer Trustees, together with their successors selected in the manner provided herein, and agrees to be bound by all the actions taken by the said Employer Trustees pursuant to this Agreement and Declaration of Trust.

3. Section 302, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him with respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . . .

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . .; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities, . . . .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or

cases in which the Board had considered conduct that violated statutes other than the NLRA in finding an unfair labor practice[4] and reasoned that "[i]f it is right for the Board to consider violations of laws other than this entire statute, and in part predicate unfair labor practice findings upon such misconduct surely it may, and ought, take like heed of violations of related provisions of the very statute it is charged with enforcing." The ALJ concluded that by bargaining to impasse for a trust fund that violated § 302 of the LMRA, the international and the local had committed an unfair labor practice in violation of § 8(b)(3) of the NLRA.[5] The ALJ recommended that the Board order the international and local to delete the provisions for the trust fund from the 1974 contract or at the option of the association to void the entire agreement and renew the collective bargaining process; to refund any contributions made by members of the association to the trust fund; and to cease and desist from demanding the trust fund.

The Board did not adopt the ALJ's findings of fact and conclusions of law on the grounds that it lacked jurisdiction to interpret § 302 and that Congress had granted the federal district courts exclusive jurisdiction to determine the structural validity of trust funds under § 302. As a general rule, the Board posited, it does not enforce other statutes except at the express direction of the Supreme Court as in *Scofield v. NLRB*, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969), where the Court held that the Board must assess union rules to determine if

to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of [the Norris-LaGuardia Act].

The ALJ stated:

No employer except employers who participated in the initial establishment of SASMI may participate in the selection of any employer trustees; by contrast, the International Association retains such a right to remove and select union trustees from time to time. There is an inequality of representation in that the General President of the International may remove and replace the union's trustees at will, whereas the employers have no comparable right. Thus, the removal and replacement of employer trustees may be had only by a majority vote of the preselected "employer trustees" and not by any action whatsoever of the employers themselves. Thus, there is basis for concluding the increase in the number of trustees can be so manipulated by the union president as to control the majority of trustees. All the International President need do is refuse to agree to an increase in the number of employer trustees unless he approves the person advanced by the "employer trustee."

Section 6 of [SASMI] concerning the selection of trustees to the Fund on the part of employers makes a mockery of the idea that the Florida employers could have the least voice in any selection of who should represent them as employers. For them to be bound "irrevocably to designate" the trustee already named in the original Trust Agreement back in 1973 means McKenzie, the man put on the trustee board in California, forever pre-empts the entire matter. The reality is that they never had any choice and it was intended that they should never have any choice.

4. *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (Occupational Safety and Health Act); *Carpenters Local Union No. 22*, 195 NLRB 1 (1972) (Labor Management Reporting and Disclosure Act). *See also Southern Steamship Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942) (Board must consider policy of mutiny laws in formulating remedy for unfair labor practice).

5. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(3) to refuse to bargain collectively with an employer. . . .

they frustrate the overriding policy of all federal labor law, not just the NLRA.[6] The Board pointed out that when considering other statutes at the Court's direction it only evaluates facial compliance with the statutes. In contrast the Board said neither the Court nor Congress had directed the Board to enforce § 302, which in the present case would require interpretation of complex multiemployer trust agreements.

The Board distinguished an earlier decision, *John F. Boyle Co.*, 222 NLRB 1309 (1976), from its decision in the present case. In *Boyle* the employer had refused to appoint a trustee to administer a trust fund, even though he had agreed to the collective bargaining agreement that provided for the trust fund. The Board did not adopt the ALJ's finding that the employer had refused to bargain in good faith or his recommendation that the employer be compelled to comply with the trust provisions. Instead, because the proposed trust fund violated § 302(c)(5)(C) by mixing pension benefits with other fringe benefits, the Board held that the employer had not refused to bargain in good faith. In the present case the Board explained that it had merely used § 302 as an aid in *Boyle* to determine whether the employer had refused to bargain collectively in violation of § 8(a)(5). However, in *Central Florida*, the Board had the view that it would first have to determine the validity of the trust fund under § 302 and then predicate an unfair labor practice finding upon any such violations.

The Board acknowledged its obligation to accommodate other statutory policies in administering the NLRA. It discerned an intent by Congress to compel compliance of trust funds with the requirements of § 302 without depriving the employees of their benefits. This intent the Board said could only be achieved by the district courts, which have the equitable powers to correct technical defects in a fund without disturbing employer contributions and employee benefits. By contrast, the Board only has the power to jettison the whole trust fund from the collective bargaining agreement. Therefore, the Board concluded, it would not extend its jurisdiction to determine the validity of the trust fund under § 302.

The Board also decided the association's other claims, which the ALJ had found unnecessary to address.[7] The Board found that the employer-appointed trustee of the trust fund was not a collective bargaining agent of the employer within the meaning of § 9 of the NLRA, 29 U.S.C. § 159, and that the trustee's sole responsibility is to the employees as a fiduciary. Thus, although the association had been denied the choice of a trustee, who had been appointed by the first participating employers association, by striking for the trust fund the union local had not coerced the members of the association in violation of § 8(b)(1)(B).

6. As a result of the *Scofield* mandate, the Board explained, it found that the union in *Carpenter Local Union No. 22*, 195 NLRB 1 (1975), had restrained and coerced a member in retaliation for his complaining about the conduct of an intraunion election in violation of his right to participate freely in internal union affairs guaranteed by the LMRA.

7. The association raised three other claims: (1) the trust fund, which denied the association the right to select its own trustee, coerced the association in its selection of a collective bargaining representative in violation of § 8(b)(1)(B); (2) the trust fund is a nonmandatory subject of bargaining over which the union cannot strike because it permits payment of strike benefits; and (3) the trustee designation clause is a nonmandatory subject of bargaining because it pertains solely to the relationship between a party and its representative.

Second, the Board held that the general counsel had not sustained the burden of proving that the trust fund authorizes strike benefits. The Board reviewed the trust documents and found no mention of strike benefits and no evidence that the trustees interpreted the trust agreement to authorize such benefits.

Finally, the Board held that the trustee designation clause was a mandatory subject of bargaining. The Board noted that the payments from the trust fund were clearly wages within the meaning of § 8(d),[8] and concluded that the trustee designation scheme was "inextricably interwoven and subservient" to the trust fund as a whole because multi-employer, industrywide trust funds, which cannot add a trustee for every employer who participates, afford greater financial benefits to the employees.

The association raises the following as error:

1. The Board erred in deciding it lacked jurisdiction to rule upon the validity of the trust fund under § 302. To the contrary, the Board has the statutory authority and obligation to assess the legality of a trust under § 302(c)(5) in determining whether the fund is an illegal subject of collective bargaining.

2. The Board erroneously concluded that trustees are not collective bargaining agents of the parties who appointed them.

3. In holding that the trust fund did not authorize strike benefits, which would render it a nonmandatory subject of bargaining, the Board ignored the evidence and contrary federal law under § 302(c)(5)(A).

4. The Board erred in finding the trustee designation clause a mandatory subject of bargaining. Even though the benefits payments from the fund are a mandatory subject of bargaining the trustee selection mechanism is an independent clause that does not relate directly to the employer/employee relationship.

We affirm the Board's decision.

I. Jurisdiction of the Board to determine validity of a § 302 trust.

[1] We are reviewing the Board's decision that the union did not commit an unfair labor practice under § 8(b)(3) by bargaining to impasse for a trust fund alleged by the association to violate § 302 of the LMRA. This issue presents problems of the interplay between the NLRA, which the Board administers, and the LRMA, which the district courts enforce. The issue can be divided as follows: Did the Board interpret § 8(b)(3) correctly and did it properly accommodate § 302 in its interpretation? When presented with a question of statutory construction of the NLRA this court defers to the interpretation given the statute by the Board as the agency charged with its enforcement if that interpretation is reasonable and consistent with prior holdings, *Enterprise v. NLRB*, 429 U.S. 298, 304, 97 S.Ct. 576, 581, 50 L.Ed.2d 494 (1977); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

Sections 8(a) and (b) respectively define employer and union unfair labor practices. In addition to prohibiting specific acts § 8 also incorporates the rights

8. "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...."

and requirements of §§ 7 and 9 of the NLRA, 29 U.S.C. §§ 157 and 159.[9] Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer representative who has a concomitant duty to bargain under § 8(a)(5). Section 8(d) defines collective bargaining as meeting and conferring in good faith with respect to "wages, hours and other terms and conditions of employment," the so-called mandatory subjects of bargaining.

The Board has consistently held that a violation of § 302 of the LMRA is not ipso facto an unfair labor practice. *Cheney California Lumber Co.*, 130 NLRB 235, 240 (1961), *affirmed*, 319 F.2d 375 (9th Cir. 1963); *Baggett Industrial Contractors*, 219 NLRB 171, 172 (1975). This is a reasonable interpretation of § 8, and the association does not challenge it. That section contains the exclusive acts that constitute an unfair labor practice while a violation of § 302 is a criminal act, a misdemeanor, § 302(b).

The association contends, however, that the union's insistence on the inclusion of an illegal contract provision, in this case the trust fund, within the collective bargaining agreement amounts to a refusal to bargain in good faith. In this manner, the association argues, the Board would be enforcing the NLRA and not § 302.

[2] The proposition that striking for an illegal contract provision is a refusal to bargain in good faith is not beyond dispute. It has generally been applied in cases where the illegal contract provision violates another part of § 8.[10] The right of an employer to be free from economic coercion by the union to implement an illegal contract term is at least within the realm of protection afforded in § 8. However, if the Board were to extend such protection whenever a contract provision is alleged to violate any statute, two problems might arise. First, the Board would be interpreting and, in effect enforcing, statutes in areas outside of its expertise.[11] Second, the Board's limited method of enforcement might conflict with another statute's enforcement scheme.

9. For example, neither employers nor unions may interfere with an employee's exercise of rights guaranteed in § 7, *see* §§ 8(a)(1) and 8(b)(1)(A). A union may not force an employer to bargain with one union when another union has been certified under the provisions of § 9, *see* § 8(b)(4)(C).

10. *See Associated General Contractors v. NLRB*, 465 F.2d 327, 334 (7th Cir. 1972), *cert. denied*, 409 U.S. 1108, 93 S.Ct. 907, 34 L.Ed.2d 689 (1973) (bargaining to impasse for an arbitration clause that coerced employer in selection of collective bargaining representative); *NLRB v. Amalgamated Lithographers*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943, 83 S.Ct. 936, 9 L.Ed.2d 968 (1963) (violation of the hot cargo provision of § 8(e)); *In Re Maritime Union*, 78 NLRB 971, *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954, 70 S.Ct. 492, 94 L.Ed. 589 (1950) (violation of § 8(b)(2)); *International Typographical Union, Local 38 v. NLRB*, 278 F.2d 6 (1st Cir. 1960), *rev'd in part and aff'd in part*, 365 U.S. 705, 81 S.Ct. 855, 6 L.Ed.2d 36 (1961) (violation of §§ 8(b)(2) and 9(a); *but see Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057, 1061 (S.D.N.Y.1975) (bargaining to impasse for wage provisions that violate the Equal Pay Act would be an unfair labor practice, relying upon the cases cited above).

11. In *NLRB v. Amax Coal Co.*, — U.S. —, — n. 21, 101 S.Ct. 2789, 2798 n. 21, 69 L.Ed.2d 672, 685 n. 21, the Court noted that if the administration of trust funds were considered "collective bargaining" within the meaning of § 8(d), the Board would have to review the actions of the trustees to determine if they were bargaining in good faith under § 8(a)(5). This, said the Court, would force the Board to regulate areas not committed to it by Congress.

The Board's decision in the present case that it has no jurisdiction to determine the validity of a § 302 trust fund is not entirely consistent with its past decisions addressing allegations of § 302 violations. In *Cheney California Lumber Co., supra*, a union struck to compel the employer to agree to a health and welfare trust proposal contended by the employer to violate § 302. The Board did not adopt the trial examiner's finding that the proposal did not provide the safeguards required by § 302 because the evidence showed that the union was striving for a legal trust and further negotiations on the trust were contemplated. The Board observed that it did not have direct responsibility for enforcing § 302 and stated that, in the absence of a determination of the trust proposal's illegality by the agency charged with enforcing § 302, it was "not prepared to say that [the union's] insistence thereon constituted a refusal to bargain in good faith." 130 NLRB at 241–42. In *John F. Boyle Co.*, 222 NLRB 1309 (1976), the Board rejected the ALJ's finding that the employer had refused to bargain in good faith when it would not appoint a trustee to administer the trust proposed in the collective bargaining agreement it had signed. The Board pointed out that the trust proposal, which contemplated one fund for both pension and welfare benefits, violated § 302 on its face.[12] Therefore, the Board concluded, it would not order employer compliance with the collective bargaining agreement that would result in establishing a clearly illegal trust fund.

By speaking in terms of jurisdiction the Board throws its past decisions into doubt. Jurisdiction is either present or absent. Lack of jurisdiction is inconsistent with *John F. Boyle Co.*, where the Board examined the trust fund documents to determine if the proposed trust comported with § 302 requirements. The problem is properly addressed in terms other than jurisdiction. We instead focus on the Board's authority to define a refusal to bargain as including union insistence upon a contract provision that may violate a statute other than the NLRA. The Board might have adopted two extreme positions: premising a refusal-to-bargain charge upon union insistence on a contract term that violates any statute, or restricting a refusal-to-bargain charge solely to union insistence upon a contract term that violates the NLRA. It appears to us that the Board has chosen a compromise between the two extremes—that a union may bargain to impasse over a trust fund that may violate § 302 unless a court has already determined the fund's illegality or the illegality is evident on the face of the documents.

In this case the Board stressed that the alleged violation of § 302 hinged upon an in-depth analysis of a complex multi-employer trust fund. At the time of the Board's decision there had been no finding of a trust fund's illegality by a district court, except for findings of fact made pursuant to the issuing of a preliminary injunction in *Mobile Mechanical Contractors Association, Inc. v. Carlough*, 382 F.Supp. 1134 (S.D.Ala.1974). These findings, the Board held, were provisional and had no collateral estoppel effect in other judicial proceedings. Record 489 n. 10.

[3] Several factors make the Board's decision reasonable and consistent with past decisions. *Cf. Enterprises v. NLRB, supra*. First, because management and union are equally represented the trustee

12. Section 302(c)(5)(C) requires pension benefits to be kept in a separate trust.

selection process does not clearly or obviously violate § 302(c)(5)(B). The disparate means of replacing trustees permit employers to contribute without sacrificing stability of administration. If this structure is invalid the invalidity is not readily discernible on the face of the documents. Second, the trust fund is a multi-employer fund that was already functioning and to which the association members were contributing when the complaint was brought. Given the difficulty of the question involved, the Board was understandably reluctant to declare this large trust fund illegal, interfere with the bargaining process, and deprive employees of their benefits based upon its own interpretation of a law in which it has no special expertise.

Our finding that the Board's interpretation of § 8(b)(3) was reasonable does not end the inquiry. The Supreme Court has cautioned the Board to accommodate its administration of the NLRA to other statutory schemes in light of the entire scope of Congressional purpose in labor law. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed.2d 1246 (1942) (Board's reinstatement of striking seamen unlawfully discharged ignored Congressional mandate to punish seamen who disobey their employer for mutiny). The association argues that by refusing to determine the validity of the trust fund under § 302 the Board undermined the purpose of that section because its non-action would permit the union to coerce the employer to make illegal payments to union representatives.

[4, 5] The Board's decision does not frustrate either the purpose or enforcement scheme of § 302. Courts have recognized Congress' intent with respect to existing trust funds to ensure the continued flow of benefits to the trust beneficiaries despite structural flaws in the trust. *National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C.1981), *pet. for rehearing denied*, June 17, 1981 (unpublished) (employer cannot raise the invalidity of the trustee selection process as a defense to a collections action brought in district court for refusing to contribute to the same trust fund in the present case; employer may still bring an action in district court to cure structural defects). As the Board observed, its cease and desist powers to remedy an unfair labor practice cannot cure defects in the trust fund but can only enjoin payments and further demands for the fund. In comparison, a district court can enforce compliance with § 302 by eliminating the invalid provisions of the trust. *Associated Contractors of Essex County, Inc. v. Laborers Int'l Union*, 559 F.2d 222, 225 (3d Cir. 1977).[13]

Nothing in the Board's ruling before us prevents or discourages the association from seeking relief in the district court. The Board simply refused to relieve the members of the association from their obligation to contribute to the trust fund

13. The Board's decision in *John F. Boyle Co., supra*, which did not compel an employer to establish a trust fund that clearly did not comport with § 302, also accommodated § 302. Congress did not intend to force employers to contribute to trust funds not yet established. *Bricklayers, Masons and Plasterers Int'l Union v. Stuart Plastering Co.*, 512 F.2d 1017 (5th Cir. 1975); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976 (8th Cir. 1970). Where a trust fund has not been established there is no interest in continued benefits, although in *St. Louis Cordage Mills*, the court ordered the Board to fashion a remedy requiring the employer to pay the amount due into a fund not administered by the decertified union to ensure the employees would derive benefits. 424 F.2d at 981.

or to impose cease and desist sanctions against the local for demanding the trust fund.[14]

Where the Board has predicated in part an unfair labor practice upon a violation of another statute the Board found that the other statute's policies would be frustrated if, for example, an employer action has the effect of discouraging access to another agency to file complaints, *see, e. g., Alleluia Cushion Co.*, 221 NLRB 999 (1975) (discharge of employee for complaining to the Occupational Safety and Health Administration is a restraint on concerted activity even though the employee had not acted with other employees because the purpose of OSHA is to benefit all employees). A union fine against a member for complaining about an intraunion election procedure frustrated the policy of the LMRA that permits employees to participate freely in internal union affairs, *Carpenters Local Union No. 22*, 195 NLRB 1 (1972).

We defer to the Board's interpretation of § 8(b)(3) that the strike by the union for the trust fund was not a refusal to bargain in good faith. The Board's application of the statute is reasonable and consistent with past decisions. *NLRB v. Pipefitters*, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977).

II. Trustees as collective bargaining agents

[6] *NLRB v. Amax Coal Co.*, — U.S. —, 101 S.Ct. 2789, 69 L.Ed.2d 672 (3d Cir. 1980), disposes of the association's argument that by striking for the trust the union coerced the employer's choice of a collective bargaining agent. In *Amax*, an employer who ran deep-shaft coal mines participated in a national multi-employer trust fund, the employer-appointed trustee of which had been selected by a coal operators association to which the employer belonged. The employer subsequently opened a surface mine with respect to which its membership in the association did not apply. The employer refused to contribute to the trust fund on behalf of the surface mine employees and the union struck. The operators association had already been chosen by the management trustee. The employer charged the union with an unfair labor practice, contending that the union was coercing it in its selection of a collective bargaining agent in violation of § 8(b)(1)(B). The Court unequivocally rejected this argument by holding that a trustee acts solely as a fiduciary and cannot administer the trust fund in the interest of the party who appointed him. — U.S. at ———, 101 S.Ct. 2794–95, 69 L.Ed.2d at 680–81. Bargaining to impasse to compel the employer to join the trust fund where the employer cannot choose the management trustee was not an unfair labor practice.

The association contends that *Amax* is not controlling because the Court's holding that an employer-appointed trustee is not a collective bargaining agent is premised on a valid trustee selection process. The association brings forward several reasons which it says demonstrate that the trustee selection process in the present case is not valid. First, in *Amax*, although the individual employer could not appoint the trustee, the operators association to which it belonged had the opportunity to choose the trustee, while in this case the association had no voice in selecting a trustee because the first par-

14. Whether the district courts can enjoin a strike for a trust fund that violates § 302 has never been properly brought to this court. *See Mobile Mechanical Contractors Ass'n v. Carlough*, 566 F.2d 1213 (5th Cir. 1977) (issue moot).

ticipating employers association already had chosen the sole management trustee. Second, the international president, Carlough, had helped select the sole management trustee.[15] Finally, Carlough himself serves as the union-appointed trustee and, the association says, cannot divorce his union responsibilities from his fiduciary obligations when administering the trust fund.

[7] We hold that these asserted differences do not cause the trustees of the trust fund in this case to function as collective bargaining agents. A trust fund could not operate if each late-joining employer or association of employers could upset an earlier choice of a management trustee on the ground it had no opportunity to participate in the selection. Although Carlough was appointed by the union, he is required to administer the trust as a fiduciary and in the sole interest of the employees. With respect to union participation, through Carlough, in the selection of the management trustee, even if the participation is to a degree prohibited by § 302, the trustee must still serve as a fiduciary with his sole obligation running to the employees. As we pointed out in Part I, the proper remedy for alleged unequal representation in the selection mechanism is for the association to bring an action in district court. The asserted defects that are said to distinguish this case from *Amax* do not diminish the duty of trustees, whether management-appointed or union-appointed, to serve as fiduciaries nor do the defects permit the trustees to act as collective bargaining agents. One violation of § 302 cannot justify another.

15. The district court so held in the companion case, *Mobile Mechanical Contractors Association, Inc. v. Carlough*, 456 F.Supp. 310 (S.D. Ala.1978), *affirmed on other grounds*, slip op. p. ——, — F.2d —— (5th Cir. 1981). We accept this finding as correct for purposes of the present case.

III. Strike benefits as a nonmandatory subject of bargaining

[8, 9] The trust fund pays benefits to "involuntarily underemployed" workers. The association argued that striking union members could receive benefits for being involuntarily underemployed. A union cannot bargain to impasse for strike benefits because they do not come within the scope of wages or other mandatory subjects of bargaining listed in § 8(d), *Operating Engineer, Local 12*, 187 NLRB 430, 432 (1970). Payment of strike benefits from an employer-funded trust violates § 302, which lists the type of permissible payments. *See Carpenters v. Del. Contractors Ass'n*, 344 F.Supp. 1281, 1285 (D.Del.1972), *aff'd*, 477 F.2d 564 (3d Cir. 1973) (Congress impliedly prohibited payments to union representatives not specifically excepted).

After reviewing the trust fund documents and other evidence presented to the ALJ the Board found that the documents did not explicitly provide for strike benefits and the trustees had not so interpreted them. The possibility that trust payments could be made to strikers under the guise of involuntary underemployment did not transform the trust fund into a nonmandatory subject of bargaining. Thus the general counsel had not met his burden of proving an unfair labor practice.

The association also contends that the Board erroneously placed the burden of proof on the general counsel instead of the union, which has the burden of establishing a trust's strict conformity with § 302 requirements. Further, the associ-

Best Copy Available